

Exhibit H

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 2:11-cv-01754-JLL-JAD

KIMBERLEE WILLIAMS, et al.,
Plaintiffs,

vs.

BASF CATALYSTS, LLC, et al.,
Defendants.

Monday, January 15, 2018

Stenographic Transcript of Oral
Argument, taken at the law offices of Ballard Spahr,
1735 Market Street, 48th Floor, Philadelphia, PA,
before Robert J. Boccolini, Certified Court Reporter,
on the above date, commencing at 10:30 a.m., there
being present:

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BY: ROBERTO RIVERA-SOTO, ESQ.
SPECIAL MASTER
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1 **SPECIAL MASTER:** Good morning, everyone.

2 Happy Martin Luther King Day to everybody.

3 Could I get the appearances of counsel,
4 starting with the plaintiffs, please.

5 **MR. PLACITELLA:** Christopher Placitella
6 on behalf of the plaintiffs.

7 **MR. COREN:** Michael Coren on behalf of
8 the plaintiffs.

9 **MR. ROTH:** Harry Roth on behalf of the
10 plaintiffs.

11 **MR. FARRELL:** Peter Farrell on behalf of
12 defendant BASF.

13 **MR. ASSAF:** Gene Assaf for BASF.

14 **MR. RYAN:** Robert Ryan for the Cahill
15 defendants.

16 **MS. FIELDS:** Cassandra Fields, Williams
17 & Connolly, on behalf of the Cahill defendants.

18 **MR. LITTLE:** Brendan Little on behalf of
19 the Bevan firm.

20 **SPECIAL MASTER:** Okay. Miss Fields,
21 you got a little bit ahead of us, but that's okay.

22 Anyone else who's on the own phone?

23 **MR. BOYLE:** John Boyle for defendant
24 Arthur Dornbusch.

25 **SPECIAL MASTER:** Welcome, Mr. Boyle.

1 **MR. BOYLE:** Thank you.

2 **MR. BRESS:** Dan Bress for BASF, your
3 Honor.

4 **SPECIAL MASTER:** You're the one I can
5 thank for the e-mail yesterday afternoon.

6 **MR. PLACITELLA:** Yes, thank you.

7 **SPECIAL MASTER:** Anyone else?

8 **MR. QUINN:** Good morning, your Honor.
9 This is Justin Quinn for BASF.

10 **SPECIAL MASTER:** Good morning, Mr.
11 Quinn.

12 Anyone else?

13 **MR. MONTALTO:** Your Honor, Vince
14 Montalto, in-house counsel for BASF.

15 **SPECIAL MASTER:** I'm sorry, can you give
16 me your name again, please?

17 **MR. MONTALTO:** Sure. It's Vince
18 Montalto. I'm senior litigation counsel at BASF.

19 **SPECIAL MASTER:** Anyone else? Okay.
20 Going once. Going twice.

21 All right. We have what are two
22 motions. And then we also have a little bit of a
23 controversy concerning the proposed submissions that
24 BASF and/or the Cahill Gordon defendants wish to make
25 in response to plaintiffs' motion concerning the

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1 crime fraud exception and/or Kozlov exceptions to the
2 attorney/client privilege.

3 I'm going to do this a little bit out of
4 order and I'm going to start with the BASF motion to
5 compel the production of what's now being called the
6 Bevan database. And let me start with that.

7 On December 15, 2017, BASF filed a
8 motion to compel what is now called the Bevan
9 database that was docketed at ECF number 383. There
10 are three things in specific that BASF is asking that
11 the database contain.

12 The first one is the identity of the
13 referring attorney. Second is whether the Bevan
14 plaintiffs qualified for or received payment from any
15 asbestos settlement trust. And number three, any
16 compensation that was received by the Bevan
17 plaintiffs

18 BASF asserts that in this motion the
19 plaintiffs in this case were interlopers when Bevan
20 had already agreed to produce the databases.

21 BASF wants the database entries produced
22 unredacted save for personal identifiers, social
23 numbers, addresses, the like.

24 On December the 20th, ECF number 390, a
25 scheduling order was entered in respect of the

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1 opposition and replies.

2 On December 27, 2017, under ECF number
3 394, the plaintiffs filed an opposition saying that
4 they had only -- that the agreement in respect of the
5 Bevan database was only as to a process, not as to
6 the result, that much of what it was being requested
7 was barred by one of the October 26, 2017, orders,
8 and that the Ohio disclosure statute is inapplicable,
9 that the probate information is irrelevant, and that
10 the prior ruling that was made in respect of how many
11 files from the Bevan files were to be produced was
12 not based on burdens

13 The plaintiffs also assert that the BASF
14 defendants are not entitled to the identity of the
15 referring lawyers because it is a trade secret and
16 that the motion prematurely assumes the nature of the
17 putative class.

18 On December 27, under ECF number 395,
19 Bevan filed its opposition -- and when I say Bevan, I
20 mean both the firm and Mr. Bevan -- that incorporates
21 the objections that were filed by plaintiffs, that
22 ask that the production be defined by the class
23 certification motion that has not yet been filed, and
24 that the production be subject to a Rule 502(d)
25 order.

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1 According to Bevan, the agreement only
2 was to discuss the production, that the limitations
3 they're proposing are reasonable, that
4 confidentiality, proprietary business information,
5 information about parties who are not part of the
6 class should not be subject to disclosure, that the
7 entire database is an attorney work product, and that
8 it is a, quote, relational database containing
9 approximately 350 data fields, unquote.

10 I wish I knew what that meant, which is
11 why I wrote it down verbatim.

12 Bevan also says that the referral
13 sources are proprietary and not relevant and that, 2,
14 it was barred by the prior October 26, 2017, order
15 that is at ECF number 367.

16 On January the 3rd, 2018, under ECF 398,
17 BASF filed its reply. And it basically says that
18 what's sauce for the goose is sauce for the gander.
19 If BASF was required to and did produce its database,
20 likewise the Bevan database should be presented. It
21 basically repeats the arguments that are set forth in
22 its initial submission and says that an appropriate
23 protective order cures any trade secret claim.

24 Normally I would then move to the movant
25 and say: What do you think?

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1 But I'm going to do things a little bit
2 differently today.

3 Mr. Little, you're here representing
4 Bevan.

5 **MR. LITTLE:** Correct.

6 **SPECIAL MASTER:** What do you want us to
7 do?

8 **MR. LITTLE:** Well, first of all, I want
9 to correct I think what you recited about our
10 position.

11 I mean, first of all, we're taking the
12 position that the entire database, regardless of what
13 was offered in the meet and confer process, is work
14 product and should not be produced and that really
15 the burden is on BASF to show why they need it. And
16 they haven't met that burden. So --

17 **SPECIAL MASTER:** Well, get past that,
18 because I'm going to find that they have.

19 So do how do we go about curing your
20 concerns?

21 **MR. LITTLE:** Well, I mean, the proposal
22 that was made by the plaintiffs with the Bevan firm's
23 input I think gives BASF everything that they need.
24 And I think that the three categories of fields that
25 they have a dispute -- that there's a dispute about,

1 and they're covered by prior rulings of the Court,
2 nothing has changed to alter that ruling regarding
3 settlement information.

4 There's no relevance or need for the
5 referring attorney. I don't see how that relates
6 either to the merits of the underlying case or the
7 issues or elements in the claims made by plaintiffs
8 in this case.

9 And in regard to the last category of
10 information, I mean, the fact that some of those
11 trust documents may be public under a 2011 law, I
12 don't see how that puts that information in a
13 different category than the other settlement
14 information the Court's previously ruled on.

15 So in summary, I think that the proposal
16 that was made by the plaintiffs was reasonable.

17 However, we still take the position for
18 the record that the entire database is work product.

19 And I think it's important to look at
20 what this is, because we are all attorneys and we can
21 all appreciate that a database containing information
22 about that firm's clients that was largely derived
23 from information provided by those clients and
24 medical practitioners, to order that to be produced,
25 especially without the presence of those clients in

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1 this lawsuit at this time is really an unprecedented
2 and scary thought.

3 I mean, every law firm maintains
4 databases. It's how in modern litigation information
5 is organized and exchanged. And it's no different
6 than an internal memorandum about a case.

7 This is information that was selected by
8 the attorneys at the Bevan firm or at the direction
9 of the Bevan firm because of its importance to all of
10 its asbestos cases.

11 So we're not unfortunately giving up any
12 ground on the position that the entire database is
13 work product and is protected and that it also
14 contains significant attorney/client privilege
15 information.

16 **SPECIAL MASTER:** Now, tell me more about
17 this database. I assume it's some form of
18 spreadsheet that has categories and has information
19 in respect of each category. Is that correct?

20 **MR. LITTLE:** I'm glad that you asked.
21 My understanding is that that is not correct. When
22 I say that it is a relational database, it is a
23 proprietary software that is similar to Microsoft
24 Access in that it contains database -- several
25 different databases and is able to present that

1 information through an interface and produce reports
2 that are then essentially in spreadsheet form.

3 **SPECIAL MASTER:** Okay. But the net
4 result of what would be produced, if it's ordered to
5 be produced, would be some form of spreadsheet,
6 correct?

7 **MR. LITTLE:** Correct. That is an
8 output option.

9 And one other point about the database
10 that I want to emphasize, that it contains
11 information for current and former clients, including
12 clients that are not part of the class even as it's
13 broadly pled in the current operative complaint.

14 And so, you know, to be able to do what
15 BASF asks, which is essentially to provide a copy or
16 access to the database, is simply not possible.

17 **SPECIAL MASTER:** I don't understand the
18 not possible part.

19 **MR. LITTLE:** Well, because as far as I
20 know, there's no way to limit access to just the
21 clients that are part of this litigation.

22 **SPECIAL MASTER:** Are you telling me that
23 someone can't produce a spreadsheet and then take out
24 from that spreadsheet the names of people who are not
25 part of this class and would never be part of this

1 class, regardless of how it's defined?

2 **MR. LITTLE:** That is possible.

3 **SPECIAL MASTER:** Okay.

4 **MR. LITTLE:** But in terms of providing a
5 copy -- and this may be a misunderstanding about what
6 was contained in the database when we were having our
7 meet and confer discussion, but the comparison is I
8 think the Cahill database, an entire copy was
9 provided or will be provided for the plaintiffs to
10 use or to peruse at their will.

11 In this case, providing a copy of the
12 software that allows the Bevan firm to access
13 information in the database is not possible. But
14 producing some sort of spreadsheet report from the
15 database that contains a limited subset of that
16 information is a possibility.

17 **SPECIAL MASTER:** Okay. Mr. Placitella,
18 we're going backwards today.

19 **MR. PLACITELLA:** Okay. Well, I'll ask
20 for your patience because I heard your preliminary
21 thoughts and I feel compelled to make a record for
22 appeal.

23 **SPECIAL MASTER:** Please.

24 **MR. PLACITELLA:** In terms of our being
25 an interloper --

1 **SPECIAL MASTER:** I didn't -- those
2 weren't my words.

3 **MR. PLACITELLA:** I understand.

4 **SPECIAL MASTER:** I try to be as honest
5 in saying what the parties' positions are as -- I try
6 to tone them down a little bit, but other than
7 that...

8 **MR. PLACITELLA:** In our position as
9 class counsel we have the duty and a right to protect
10 the rights of the putative class members.

11 **SPECIAL MASTER:** Granted. You don't
12 have to spend any more time on that point.

13 **MR. PLACITELLA:** So a number of points
14 for the record.

15 There is no right to discovery
16 concerning absent class members and certainly not
17 putative class members.

18 Bevan's clients are not parties to this
19 case at this point. They are putative class
20 members. They're not even absent class members as
21 certification has not been granted.

22 Putative class members have not even
23 availed themselves at this point and don't even know
24 that the case exists. The request is premature.

25 So let's say for example the case gets

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1 certified and it's only certified on a C4 basis on an
2 issues class. That individual damage information
3 would only become relevant at the time the people --
4 if they decide to avail themselves of that.

5 So really, until they even see what the
6 certification brief looks like, their request is
7 premature.

8 There's also no right to confidential
9 information of putative class members. Filing of a
10 class does not waive the privilege of a putative
11 class member.

12 Suppose somebody decides to opt out.
13 They're a putative class member or an absent class
14 member. There's no law that says that just by being
15 a potential member of a class that you're waiving
16 your right to privilege.

17 We did not agree with this Court's order
18 concerning the production of the 30 files, the Bevan
19 files. And in order to move the case forward, it was
20 our belief and it's still our belief that Bevan is
21 not ethically permitted to turn over those files
22 without the clients' permission. That is supported
23 by an ethics opinion that Rothenberg provided to the
24 Court. I believe it's also supported by RPC 1.6(a).
25 Bevan, in order to --

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1 **SPECIAL MASTER:** But bear with me for a
2 moment, Mr. Placitella, because I'm having a little
3 bit of a Groundhog Day moment. Okay.

4 Haven't we been through this before?
5 And wasn't that decision made in October, which means
6 the time for review of it is long past.

7 **MR. PLACITELLA:** I'm not asking for a
8 review of that decision.

9 **SPECIAL MASTER:** Okay.

10 **MR. PLACITELLA:** I'm saying I didn't
11 agree with it.

12 **SPECIAL MASTER:** I understand you didn't
13 agree with it. But you made your record then. And
14 believe me, you want to make a record, you can have
15 all the time in the world to make your own record
16 today. I will never infringe on that. But that's
17 plowed over ground.

18 **MR. PLACITELLA:** I understand. But
19 here's my point. The point is in order to move the
20 case forward, Mr. Bevan went and got permission and
21 decided for the 30 files that's how we'll handle it.

22 Now, if he's forced to turn over his
23 database, then he arguably has to go get permission
24 under the ethical rules from everybody in that
25 database pursuant to RPC 1.6(a), from his own ethics

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1 advice. And I don't think that he's willing to do
2 that and I don't think he should be compelled to do
3 that.

4 **SPECIAL MASTER:** Is that true even if a
5 Federal Rule of Evidence 502(d) order is entered?

6 **MR. PLACITELLA:** I don't think the
7 502(d) order trumps RPC 1.6(a).

8 But there's also no right to law firm
9 work product where that law firm is not a party.
10 And the database for --

11 **SPECIAL MASTER:** I'm sorry, I don't
12 understand.

13 **MR. PLACITELLA:** Mr. Bevan --

14 **SPECIAL MASTER:** Stop for a moment.

15 **MR. PLACITELLA:** Sure.

16 **SPECIAL MASTER:** Help me understand. I
17 don't understand the basis upon which you say that a
18 law firm that is not a party cannot be compelled to
19 produce its work product. What's the authority for
20 that proposition?

21 **MR. PLACITELLA:** Well, we looked high
22 and low for a case that was like this where a
23 non-party law firm was compelled to turn over its
24 database of client information that was the product
25 of a lot of analysis and synthesis.

1 In this case this database is
2 comprised -- I checked -- of 415 separate fields
3 that are the product of analysis and synthesis by the
4 people at the Bevan law firm. I could not find a
5 single case anywhere where a court had ordered that
6 kind of discovery.

7 **SPECIAL MASTER:** Well, you have me at a
8 disadvantage, because I don't know what's in this
9 database. Okay. All I know is what I've been told.

10 And I assumed, and maybe that's my
11 mistake, that it was going to be something that was
12 akin to the BASF database, which was simply a
13 spreadsheet. Did I get that wrong or --

14 **MR. PLACITELLA:** Probably on both
15 accounts. BASF's was not simply a spreadsheet.

16 **SPECIAL MASTER:** Well, that's what was
17 shown to me.

18 **MR. PLACITELLA:** It was a relational
19 database. And it was not BASF's database. It was
20 Cahill's.

21 **SPECIAL MASTER:** Well, whoever it was,
22 the simple fact of the matter is that I was shown a
23 spreadsheet and I assumed that I was being shown that
24 for a reason.

25 **MR. PLACITELLA:** But there is a

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1 significant difference, I submit, between the
2 database that Cahill turned over, who is a party, and
3 Mr. Bevan's position representing putative class
4 members and the information that's in there. That
5 is clear work product.

6 And I haven't found a case anywhere that
7 would require that, especially given the issues of
8 privilege at stake.

9 I also read that somehow we were getting
10 in the way of a deal that was made with Mr. Bevan.
11 And that's not --

12 **SPECIAL MASTER:** Just ignore that.
13 Okay. I ignored it. You'd do well to ignore it too.

14 **MR. PLACITELLA:** But on the base that
15 was something that Bevan and BASF was trying to work
16 out.

17 It's not a place where we start from.
18 BASF rejected that offer of compromise. From our
19 perspective, they start from ground zero. They
20 don't have a right to any of it, absent some kind of
21 fair compromise by Mr. Bevan.

22 BASF overreached and now they should be
23 stuck with overreaching.

24 Now, here's the important part. The
25 discovery that's sought here by BASF and Cahill is

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1 totally not necessary and redundant. BASF already
2 has virtually all of the information except for
3 settlement information and referring counsel
4 information that's in the Bevan database. BASF has
5 scanned and it's word searchable every single case
6 that they were involved with. That includes for
7 every case. And I wrote it down. It's far more
8 complete than actually what Bevan has.

9 For each client they have all of the
10 pleadings, they have the letters between themselves
11 and Mr. Bevan, they have the clients' medical
12 records, they have expert reports that were submitted
13 by Bevan, they have depositions that were taken of
14 the Bevan clients, they have the motions that were
15 filed in the case.

16 And the database that they have for
17 purposes of what they've categorized and what they've
18 extracted, their database includes the following
19 information: The disease that each plaintiff sued
20 for, not just Bevan but every plaintiff in the United
21 States, the date of the diagnosis, the docket number
22 and case name for each, every cause of action that
23 was asserted --

24 **SPECIAL MASTER:** I don't mean to cut you
25 short, but what you're telling me is that they

1 already have the information and it's not necessary
2 to require that somebody else produce it because they
3 already have it?

4 **MR. PLACITELLA:** That's exactly right.
5 But let me just finish for the record.

6 **SPECIAL MASTER:** All right. Please.

7 **MR. PLACITELLA:** Okay.

8 **SPECIAL MASTER:** I just want to make
9 sure I'm getting your point.

10 **MR. PLACITELLA:** Absolutely correct.
11 They have the plaintiffs' employer, the claimed root
12 of exposure, every hospital where the plaintiff went,
13 a list of all the plaintiffs' doctors, the
14 plaintiffs' smoking history, the plaintiffs' family
15 members, the plaintiffs' military history.

16 They have a list of every other
17 defendant in the case. They have a list of every
18 product sold by every other defendant in the case.
19 They have every doctor who was ever deposed in the
20 cases. They have every brief that was filed in the
21 case, whether it was filed by them, the plaintiff, or
22 a co-defendant. They have every plaintiff and every
23 witness that was deposed. And they have a review
24 that was done by their own experts of the medical
25 information supplied by the plaintiff.

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1 So before we even think about making Mr.
2 Bevan have to go through what he needs to go through
3 to order in order to comply with his ethical
4 responsibilities and the burden that would take, I
5 submit that the Court should take a hard look at the
6 Cahill database and see what is in there, because
7 it's everything you could ever think of. It is very,
8 very thorough.

9 **SPECIAL MASTER:** But see, you have to
10 help me on that, because I may get the numbers wrong.

11 But I thought the last time we were here
12 and we talked about the Cahill Gordon database, what
13 I was told was that it was incomplete. And we
14 weren't talking about the substantive entries. We
15 were talking about actual number of participants in
16 it that, even though we were talking about -- and I
17 think the number I was given was between 15 and
18 18,000 potential plaintiffs, that the list only had
19 300 names on it or something like that.

20 Did I get that wrong, Mr. Roth?

21 **MR. ROTH:** I think, your Honor, and Mr.
22 Farrell can correct me, we were talking about the --
23 there was a number of Rothenberg clients that I
24 believe was 1,800, and there are 300 who show up on
25 the Cahill database.

1 **SPECIAL MASTER:** Okay. So the Cahill
2 database was greater than 300. It was just the
3 Rothenberg?

4 **MR. PLACITELLA:** There's a reason for
5 that.

6 **MR. ASSAF:** It's reversed. The Cahill
7 database has 300 and Rothenberg says it's 1,800.

8 **MR. PLACITELLA:** There's a reason for
9 that.

10 **MR. ROTH:** Let me finish.

11 **SPECIAL MASTER:** So I just want to
12 understand and make sure we're talking apples to
13 apples, okay?

14 **MR. ROTH:** We are. And I think, your
15 Honor, there was also some discussion, because nobody
16 was really clear where the 1,800 number came from in
17 terms of the number of Rothenberg files.

18 So it was not clear when we left whether
19 the 1,800 was an accurate number or the 300 or so
20 that's in the Cahill database was an accurate number.

21 **SPECIAL MASTER:** Okay. But can somebody
22 tell me whether the Cahill Gordon database contains
23 information in respect of all of the potential
24 plaintiffs in this case?

25 **MR. PLACITELLA:** Everybody except the

1 non-filers. And that's a whole issue about whether
2 they'll actually be in this case.

3 **SPECIAL MASTER:** Who's a non-filer?

4 **MR. PLACITELLA:** People who never filed.

5 **SPECIAL MASTER:** Everybody who never
6 filed a complaint?

7 **MR. PLACITELLA:** As I understand, it
8 there are close to 16,000 people.

9 **SPECIAL MASTER:** Who filed lawsuits of
10 some sort?

11 **MR. PLACITELLA:** Who are in the Cahill
12 database.

13 **SPECIAL MASTER:** Either filed a lawsuit
14 or submitted a claim of some sort?

15 **MR. PLACITELLA:** Correct.

16 **MR. FARRELL:** That's not correct.

17 **SPECIAL MASTER:** Okay. Straighten me
18 out, please.

19 **MR. FARRELL:** There are not 16,000
20 entries in the database. I don't have the exact
21 number, but it's well under that. I think it's 11
22 or 12,000.

23 **SPECIAL MASTER:** Okay.

24 **MR. FARRELL:** And then for those 11 or
25 12,000, the actual amount of information contained

1 for each individual person varies.

2 So the litany that Mr. Placitella was
3 reading off, you may find examples of each of those
4 categories, but I don't believe it would be
5 comprehensive for every individual.

6 **SPECIAL MASTER:** Okay. But I think the
7 point that Mr. Placitella is trying to make, and if I
8 do a terrible job at it, straighten me out, but I
9 think the point that he's trying to make is that you
10 already have sufficient information to make a
11 judgment in those areas that you need it for, and
12 that if after you've done that you still need more,
13 there is the ability to seek additional discovery
14 during the pendency of the class certification
15 motion. Did I get --

16 **MR. PLACITELLA:** That's a fair
17 characterization.

18 **SPECIAL MASTER:** Okay. I'm trying to
19 get to the end point here.

20 **MR. PLACITELLA:** Yes. But we're not
21 just talking about the Cahill database. We're
22 talking about that they scanned every file and they
23 have all of that in word search.

24 I took the corporate rep. That's what
25 he said. Every case they had.

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1 So even when they went to Mrs. Holley's
2 dep and took her deposition, they had the entire
3 file.

4 **SPECIAL MASTER:** I understand that. But
5 I think what I'm being told is that they have
6 everything that they have, but everything that they
7 have may not be everything that there is. That's
8 what I'm being told, right?

9 **MR. FARRELL:** Yes, your Honor.

10 **SPECIAL MASTER:** Mr. Farrell, did I get
11 that right?

12 **MR. FARRELL:** The critical thing we do
13 not have is what was on the plaintiffs' side of the
14 equation in terms of deciding to dismiss or settle
15 cases.

16 All of the information that Mr.
17 Placitella just rattled off are things from the
18 defense side of the equation to the extent we have
19 them.

20 But your Honor is right, this is
21 Groundhog Day. We addressed it at the October
22 hearing.

23 The key inquiry at this point is what
24 was in the plaintiffs' mind? What was in the
25 plaintiffs' --

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1 **MR. PLACITELLA:** Well, none of that's in
2 the database.

3 **SPECIAL MASTER:** We can't --

4 **MR. PLACITELLA:** If that's what they say
5 they want, none of it's in the database. It's not in
6 the database. If this is about the database, it's
7 not in the database.

8 **SPECIAL MASTER:** Okay. Mr. Boccolini,
9 who I've known for a number of years, is a superb
10 court reporter, but he cannot take down two people at
11 once.

12 So I understand that people feel
13 strongly about this. It is not a milquetoast issue.
14 I understand that.

15 But if for no reason other than my being
16 able to read a non-garbled transcript sometime later
17 on, please work with me on this.

18 Okay. Mr. Placitella, Mr. Roth is
19 being very patient, having shaved his beard, waiting
20 to speak.

21 So I think your partner's not happy that
22 you're going to speak, but go right ahead.

23 **MR. ROTH:** I just want to make sure that
24 your Honor has a picture of the universe of
25 information that we're talking about here.

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1 One, with respect to Mr. Farrell's point
2 about what's on our side of the equation and in the
3 heads of the plaintiffs, we're going to argue about
4 that later. That's not the database issue.

5 Two, those things that Mr. Placitella is
6 describing --

7 **SPECIAL MASTER:** Well, we're going to
8 argue about that in respect of the interrogatories.

9 **MR. ROTH:** Yes, your Honor.

10 **SPECIAL MASTER:** But those are your
11 interrogatories. Right now we're talking about the
12 Bevan database --

13 **MR. ROTH:** That's correct, your Honor.

14 **SPECIAL MASTER:** -- and its production.

15 **MR. ROTH:** And that's what I was
16 referring to. The issue that Mr. Farrell raises
17 addresses the responses to interrogatories that we'll
18 address later.

19 **SPECIAL MASTER:** I didn't understand Mr.
20 Farrell's response to be so limited.

21 **MR. FARRELL:** It was not.

22 **SPECIAL MASTER:** Okay.

23 **MR. ROTH:** I guess the point being that
24 there is nothing with respect to the plaintiffs'
25 thought processes that is in the database, as counsel

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1 knows because they have seen all of the fields.

2 **SPECIAL MASTER:** Okay.

3 **MR. ROTH:** And we have spoken -- Mr.
4 Placitella spoke about the Cahill databases and then
5 just mentioned the corporate rep deposition that was
6 taken.

7 And I mentioned this at our last
8 argument. Mr. Steinmetz was deposed about data
9 Kirkland & Ellis working with BASF collected after
10 they were engaged in this case where they have filed
11 and scanned all of the case files that were pending.

12 So when we talk about databases, that is
13 included in this. That's a word searchable
14 proprietary database that Kirkland has created that
15 provides them with all of the information that Mr.
16 Placitella was describing in his response.

17 And with that, I yield the floor so that
18 Chris doesn't --

19 **SPECIAL MASTER:** Doesn't hit you, yes.

20 **MR. PLACITELLA:** So the point being if
21 you're going to come forward and ask for this kind of
22 information and ask for people's work product and to
23 invade privilege issues, then you have to make some
24 showing that you don't have it already.

25 They have not made that showing.

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1 **SPECIAL MASTER:** Well, I think what you
2 really mean is you have to make some showing that
3 it's not otherwise available by less onerous means.

4 **MR. PLACITELLA:** Exactly. That's
5 exactly right. Thank you.

6 **SPECIAL MASTER:** That's my
7 English-to-English translation.

8 **MR. PLACITELLA:** Yes.

9 **SPECIAL MASTER:** Okay.

10 **MR. PLACITELLA:** And then on the
11 specifics, for example, as it relates to -- let's
12 take the referral orders.

13 Again, I looked pretty hard and we
14 looked pretty hard. I haven't seen any case where a
15 lawyer was compelled to turn over his or her business
16 sources. That goes to the very heart of how law
17 firms survive.

18 **SPECIAL MASTER:** Well, I understand
19 that. But it is the allegation that there was this
20 organization that referred cases. Calling it an
21 organization might be giving it a dignity it doesn't
22 have. But there was this grouping of lawyers who
23 referred cases out to other people and that the
24 behavior of that group was called into question by
25 one or more courts, and certainly by the American Bar

1 Association, and that having that information would
2 assist the defense in saying whether a plaintiff's
3 claim is somehow questionable or the like.

4 I mean, what do we do in the face of
5 that?

6 **MR. PLACITELLA:** Well, Judge, there's no
7 evidence whatsoever in the record that Mr. Bevan did
8 anything wrong or was part of any --

9 **SPECIAL MASTER:** Nobody's saying that he
10 did.

11 **MR. PLACITELLA:** But this is a total
12 fishing expedition without any basis whatsoever.
13 Just because some lawyers in some other state at some
14 other point in time also had tire worker cases and
15 did things that, you know --

16 **SPECIAL MASTER:** They shouldn't have.

17 **MR. PLACITELLA:** -- we shouldn't have
18 done or they -- doesn't mean Mr. Bevan was involved.
19 There's no prima facie showing of that. And it
20 certainly doesn't justify it.

21 Let's talk about that for a second.
22 The defendants in this case reviewed and received
23 already all of the underlying medical reports from
24 the Bevan cases. They got them in the context of
25 those cases.

1 In the context of the Bevan cases, they
2 had their own experts look at those reports. In the
3 context of the Bevan cases, they never --

4 **SPECIAL MASTER:** But that doesn't answer
5 the question about the referring attorney.

6 **MR. PLACITELLA:** It does. It does.

7 **SPECIAL MASTER:** How so?

8 **MR. PLACITELLA:** Because the bottom of
9 their allegation is that somehow the cases that were
10 referred to Bevan, if in fact they were referred, did
11 not have reasonable medical support and were the
12 product of doctors who weren't doing things properly
13 and as a result --

14 **SPECIAL MASTER:** Well, the way I
15 understand what the defendants are saying is that
16 there was this group of lawyers who were referring
17 cases out. They behaved in an improper way and that
18 may very well have tainted whatever referrals they
19 sent out. So we, the defendants, are entitled to
20 trace the genesis of that action, because if it came
21 from what some courts and certainly the American Bar
22 Association have said was a tainted source, the case
23 itself may not be tainted.

24 But we ought to be able to test that,
25 no?

1 **MR. PLACITELLA:** Why?

2 **SPECIAL MASTER:** Why not?

3 **MR. PLACITELLA:** I'll tell you why not.

4 **SPECIAL MASTER:** Why not?

5 **MR. PLACITELLA:** Because they --

6 **SPECIAL MASTER:** It's discovery.

7 **MR. PLACITELLA:** No. Judge, with all
8 due respect, those cases --

9 **SPECIAL MASTER:** It's not discovery?

10 **MR. PLACITELLA:** There was discovery in
11 the underlying case. Those medicals were given to
12 Engelhard and BASF. They were reviewed by their
13 experts --

14 **SPECIAL MASTER:** Right.

15 **MR. PLACITELLA:** -- in those cases.
16 They were not challenged in those cases.

17 In fact, Engelhard and BASF settled
18 cases after they reviewed those medicals for cheap.
19 They did not challenge those medicals. They did not
20 challenge those medical reports in the underlying
21 case or they got people to dismiss their cases.

22 By the Third Circuit, that ship has
23 sailed. They have lost their right to challenge the
24 medical causation in that underlying case.

25 They reviewed those medicals, your

1 Honor. They had their experts review those
2 medicals. And they were not challenged. If they
3 had a problem--

4 **SPECIAL MASTER:** Well, work with me on
5 this. Let us assume that the facts are the way you
6 just described them. BASF, either in its current
7 iteration or when it was Engelhard, received the
8 medical reports. They looked at them at face value
9 and made a decision in respect of settlement or
10 non-settlement based upon those reports.

11 And it later turns out that those
12 reporters were not credible.

13 And I'm not saying anything that should
14 come as a surprise to anybody here, because my
15 information in respect of that is anecdotal.

16 I remember when within the legal
17 profession it became painfully known that there was
18 something not right going on in respect of the
19 asbestos cases that were being sent through a mill to
20 doctors who really were not doing their job and it
21 literally came on the heels -- on the heels, I'm
22 sorry, of a different large case, the fen-phen case,
23 where the same allegations were being made. That's
24 why I remember it from 20 plus years ago.

25 And so whether BASF accepted those

1 reports at face value back then, now they have
2 knowledge that says: Well, maybe we ought not to
3 have and maybe we should explore that a little bit
4 further.

5 Are you saying that that's not fair game
6 here?

7 **MR. PLACITELLA:** It's not fair game.
8 They had those cases dismissed fraudulently. This
9 case is about what they did. They made a decision to
10 do what they did independent of whatever those
11 medical reports said. They did what they did
12 independent of what those medical reports said.

13 There is no showing in this case that
14 Mr. Bevan did anything wrong. There were --

15 **SPECIAL MASTER:** I don't think there's
16 been any allegation that Mr. Bevan did anything
17 wrong.

18 **MR. ASSAF:** Correct.

19 **SPECIAL MASTER:** There certainly hasn't
20 been any that I have seen. And certainly nothing
21 that occurs here is to be viewed as any kind of
22 aspersion on Mr. Bevan and his firm. Okay.

23 So you can put that -- throw that whole
24 notion in the trash heap, because that's where it
25 belongs as far as I'm concerned.

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1 But the difficulty that I'm having is
2 that you properly so are arguing your clients'
3 position as a fact accomplished. That's exactly what
4 you should be arguing.

5 My problem is I can't accept that
6 ultimate conclusion, because all we have right now
7 are a complaint and an answer. So the facts have
8 not been established.

9 I have to say to myself: I understand
10 what the plaintiffs are alleging. And I think you've
11 figured out by now that I do understand what the
12 plaintiffs are alleging.

13 But by the same token, the defendants
14 have their defense. And nothing has been proven as
15 of yet.

16 And the whole purpose of the exercise in
17 which we find ourselves is to get facts to support
18 either side when the issues are finally teed up and
19 ready for disposition.

20 So that's the perspective that I'm
21 looking it from. I'm looking at it from the fact
22 that everybody who is in this room, including the
23 folks who are on the phone, are entitled to get a
24 fair shot at discovering facts that may help their
25 ultimate position when it's being advanced. That's

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1 all.

2 **MR. PLACITELLA:** I understand that. So
3 let's take it from the proposition. They have the
4 medical report to for Mrs. Holley. It's a Dr. X.
5 They have no evidence that Dr. X did anything wrong.
6 They've had that for decades.

7 What difference does it make where Mrs.
8 Holley's case came from? You know, there's a danger
9 here.

10 **SPECIAL MASTER:** Well, let me ask you
11 this. Where that case came from, how is that
12 protectable information?

13 **MR. PLACITELLA:** It's a business
14 interest. It's a trade secret.

15 **SPECIAL MASTER:** It's not a trade
16 secret. Okay. I know you argued that. I know it
17 was advanced. I think I know what a trade secret
18 is. That's not a trade secret. Okay.

19 So the fact that John Doe refers a case
20 to me is not a trade secret. The fact that John Doe
21 referred to case to me is not a trade secret.

22 **MR. PLACITELLA:** Your Honor, it's
23 business proprietary information.

24 **SPECIAL MASTER:** I understand. How is
25 it confidential?

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1 **MR. PLACITELLA:** It's confidential, it
2 has the potential to hurt people.

3 **SPECIAL MASTER:** How?

4 **MR. PLACITELLA:** Let's say you're a
5 defense lawyer and you refer a case to Roth and you
6 make that referral --

7 **SPECIAL MASTER:** Not after he shaved his
8 beard.

9 **MR. PLACITELLA:** Maybe you don't want
10 the world and all your other potential business
11 sources to know that you have a relationship with
12 Roth. I mean, that's up to -- you know, that's
13 between you and Roth.

14 **SPECIAL MASTER:** But what I want or
15 don't want is irrelevant to the question of whether
16 the law protects it.

17 Mr. Roth, you're going come to your own
18 defense here. Tell me.

19 **MR. ROTH:** Well, first of all, whoever's
20 referring a case to me is making a wise decision.

21 But first of all, viewed in the context
22 of discovery of a non-party lawyer, the defendants
23 have argued that the source of the case may
24 demonstrate that a particular case is tainted.

25 **SPECIAL MASTER:** That's what I

1 understand them to be saying.

2 **MR. ROTH:** So that's their argument.

3 And yet, you know, one, we are not at the issue of
4 whether a case is tainted, your Honor. We don't yet
5 know what the class is going to look like and whether
6 that matters.

7 And second, Engelhard/BASF has had these
8 medical records not just reviewed at face value, your
9 Honor, these were vetted by experts. And that in
10 and of itself demonstrates -- you know, they didn't
11 make an argument then that these are tainted cases.

12 And I think that that's the point, that
13 in terms of the -- if the idea is that the referral
14 source equals proof that the case is tainted, well,
15 the actual proof of whether the case is tainted is
16 going to come from the medical records that BASF and
17 Engelhard have.

18 **SPECIAL MASTER:** Well, that's not
19 necessarily so. As you well know, for example, in
20 the fen-phen cases, they settled thousands of those
21 cases, until somebody finally said: Wait a minute,
22 look at these three or four doctors who are looking
23 at thousands of patients and look at their reports.
24 All they're doing is changing the name.

25 But you can't do that in the first one

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1 or the second one or the third one. You do that
2 when you get to the five-thousandth and go: Okay,
3 that's now a pattern.

4 So I understand your concern. The
5 problem is it doesn't arise from the first instance.
6 It arises after you see a pattern of behavior that
7 allows to you then say: Okay, there may be a problem
8 in respect of where this is coming from.

9 **MR. ROTH:** With respect to that, your
10 Honor, one, it is fair to argue after the Williams
11 Court -- Williams opinion in the Third Circuit and
12 Judge Litner's opinion, we're not relitigating these
13 cases.

14 **SPECIAL MASTER:** Well, Judge Litner is
15 not in my chain. You mean Judge Linares?

16 **MR. ROTH:** Yes. Thank you, your Honor.

17 **SPECIAL MASTER:** Okay.

18 **MR. ROTH:** But we're not relitigating
19 the cases. And the opportunity to have done so --

20 **SPECIAL MASTER:** I will tell you as an
21 aside, Judge Litner once told me -- he has two small,
22 very nice dogs. And he once told me that he would
23 write his opinions at home with one of the dogs on
24 his lap and that's what helped him write opinions.
25 And my response to him was he needed more dogs.

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1 So go ahead. You brought Judge Litner
2 up, okay.

3 **MR. ROTH:** There's a lot about that that
4 I have to unpack, your Honor.

5 In any event, we're not relitigating
6 these cases. And this really does begin a long line
7 of discovery on what if that we're not at yet and
8 that frankly much of the record --

9 **SPECIAL MASTER:** But we are going to be
10 there shortly, because under my earlier order, the
11 class cert motion was supposed to be filed today.

12 Mr. Placitella requested an additional
13 two weeks. And over Mr. Assaf's very strong
14 objection: I said fine, take the time. I'd rather
15 have it done right than done quickly.

16 So two weeks from today we will all know
17 what the class is supposed to look like, at least
18 according to plaintiffs' counsel, and whether we're
19 going to get a request for full class certification
20 or an issues class only or even under that a limited
21 issues class only. That's in your ballpark. And we
22 will know that when you're ready to tell us, no later
23 than two weeks from today.

24 But be that as it may, that's when we're
25 going to get to it.

1 Now, I will tell you I'm fairly
2 comfortable that there is enough firepower in this
3 case and enough room between the filing of the motion
4 and whether we're ultimately going to have to deal
5 with the motion to allow for appropriate discovery to
6 occur and people to get done what needs to be done.

7 And I hope that everyone here is fairly
8 confident that you get something to me, you get a
9 response fairly quickly, including those who sent me
10 e-mails during the football games yesterday,
11 violating a holy day of obligation.

12 Be that as it may, we'll get to that
13 later. You're going to get a quick response. So
14 nothing's going to sit.

15 And I said before and I will say it
16 again. My charter is clear. I got to get this case
17 trial ready as quickly as I can.

18 So I will remind everybody here that
19 within two months this case will be seven years old.
20 Okay. That in my religion is the age of reason.
21 So at seven years old, it's beginning to grow a
22 little bit of whiskers. And we can't have that.

23 Mr. Placitella, I'm sorry.

24 **MR. PLACITELLA:** I appreciate that.

25 With respect to the Court, some of those whiskers are

1 the product of it taking a long time through the
2 appellate process and back. It wasn't --

3 **SPECIAL MASTER:** I didn't blame anybody.
4 I didn't blame anybody. And I will say right now
5 there's enough blame to go around for everybody.

6 But what I will say is that since I was
7 asked to take this over, no moss has grown on any
8 stone here.

9 **MR. PLACITELLA:** Right. So let me
10 address your issue directly.

11 In fen-phen, which I'm intimately
12 familiar with, you had a bad circumstance, one lawyer
13 out of many great lawyers. And that challenge was
14 made in the underlying case, okay, not in a
15 fraudulent concealment case later.

16 If BASF thought there was a problem --

17 **SPECIAL MASTER:** Actually, I'm not sure
18 that that is correct.

19 **MR. PLACITELLA:** It is correct.

20 **MR. COHEN:** It is correct.

21 **SPECIAL MASTER:** Well, I will tell you
22 that I was in private practice at the time and one of
23 my partners was representing one of the physicians
24 who was separately sued. And the allegation was
25 made in that separate case, not in the underlying

1 fen-phen litigation.

2 **MR. PLACITELLA:** But the -- I don't
3 want to go there. I was involved in it. I was class
4 counsel. I know what happened, okay, in the fen-phen
5 cases.

6 **SPECIAL MASTER:** Okay.

7 **MR. PLACITELLA:** That was in the
8 underlying case.

9 Here, BASF had the right and probably
10 still has the right if they believe so to go back to
11 court in Ohio and challenge any settlement that they
12 believe that they made under false information. The
13 Rooker-Feldman doctrine --

14 **SPECIAL MASTER:** 25 years after the
15 fact?

16 **MR. PLACITELLA:** Absolutely. We were
17 told that's the only thing we could do. Okay.
18 Under Rooker-Feldman, if we wanted to upset the
19 judgment of the earlier court, our only remedy was to
20 go back to that state or federal court who had the
21 original case. That's what Rooker-Feldman says.
22 That's what the Third Circuit said.

23 So if they had a problem because they
24 thought they were somehow defrauded in paying
25 whatever measly amount they paid, they had a remedy.

1 That remedy has been available to them since the
2 early 90s. And certainly they've known for decades
3 of the issue about the National Tire Workers Project
4 that they throw into every brief.

5 They chose to do nothing. They can't
6 now try to use that as a defense in a case that has
7 been extinguished. And that's exactly what they're
8 trying to do. That's exactly what the Third Circuit
9 said none of us can do. We cannot relitigate the
10 merits.

11 So if they believe that somehow the
12 doctors' reports do not support the settlement that
13 they -- they can go back to that court and ask that
14 court to reopen that case.

15 They can't come here and ask to litigate
16 that here. That's not what the law says, with all
17 due respect. And that's clearly beyond the dictates
18 of the Third Circuit.

19 Going to the other arguments, the issue
20 of settlements, this Court has already ordered that
21 BASF is not entitled to the discovery of any other
22 settlement information but for the 30 that have been
23 provided.

24 And now what BASF wants to do is say:
25 Okay. Well, that order didn't mean anything. Now we

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1 want the settlement information for everybody else,
2 whether or not those settlements were confidential.

3 And now the problem here is as follows.
4 Some of them may not have been confidential. I
5 don't know. Many of them I know from pattern and
6 practice were confidential. That means that under
7 the Rules of Professional Responsibility, Mr. Bevan
8 has obligations concerning the disclosure of
9 confidential settlement information that frankly has
10 no place here. I understand their argument. But it
11 has no place here.

12 The fact that these people were
13 defrauded has -- what they got from Owens Corning
14 Fiberglass in a settlement under seal or under
15 confidentiality should not be subject to discovery
16 here.

17 **SPECIAL MASTER:** Okay. What they got.
18 But how about the fact of the settlement?

19 **MR. PLACITELLA:** The fact --

20 **SPECIAL MASTER:** Not the amount. The
21 fact of the settlement.

22 **MR. PLACITELLA:** It is known -- it is
23 not -- they know who settled. And that's not a
24 confidential -- I mean, the fact that a settlement
25 took place is not confidential.

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1 **SPECIAL MASTER:** Okay. And so --

2 **MR. PLACITELLA:** The fact that the
3 settlement took place is not confidential.

4 **SPECIAL MASTER:** Okay. So let me take
5 that a little bit further along the way. The fact
6 that somebody qualified for or received payment,
7 without disclosing the amount, from an asbestos
8 settlement trust, is that confidential?

9 **MR. PLACITELLA:** It is not confidential.

10 **SPECIAL MASTER:** Okay. So including
11 that on the database would not make anybody crazy,
12 except for Mr. Roth who has his hand up.

13 **MR. ROTH:** The only question I have,
14 your Honor, and I don't know what the answer is, but
15 I believe it is not simply a yes/no, there's not a
16 yes/no field, did you qualify or didn't you. It may
17 just have a number.

18 **SPECIAL MASTER:** Well, I'm sure that's
19 easily remediable.

20 **MR. ASSAF:** If it's confidential.

21 **MR. PLACITELLA:** Well, how -- there are
22 some trusts that say it's confidential. There are
23 others that don't speak to it directly. This is a
24 sideshow, frankly, that is totally unnecessary.

25 **SPECIAL MASTER:** Well --

1 **MR. PLACITELLA:** What does this have to
2 do with the plaintiffs' allegations in this case?
3 Nothing. Nothing.

4 **SPECIAL MASTER:** I don't agree with you
5 on that. But you have a position to advance. And I
6 appreciate not only the cogency but also the passion
7 with which you present it.

8 You keep making Mr. Assaf write notes to
9 poor Mr. Farrell, who will according to those notes
10 have to speak for two and a half hours, which he's
11 not going to get.

12 **MR. FARRELL:** It might be three, your
13 Honor.

14 **SPECIAL MASTER:** Well, okay. If you're
15 not getting two and a half, you're not getting three.

16 Mr. Little, you've been so patient over
17 here and you have everybody picking at the carcass of
18 your client. So anything you want to add?

19 **MR. LITTLE:** Thank you, your Honor.

20 Yes, I just want to make a point about your summary
21 of the referral source and why it may be important.

22 You mentioned several times the doctors.
23 The doctors, the experts are the evidence. And if
24 there is some part of the underlying case that is to
25 be impugned, it's the experts and not the referral

1 source.

2 **SPECIAL MASTER:** But correct me if I'm
3 wrong, I understood that the doctors sort of came
4 from the referral source, that they were
5 hand-in-hand. Were they not?

6 **MR. ASSAF:** Correct.

7 **MR. LITTLE:** In some cases they may have
8 been. In some cases they may not have been. But
9 what -- using the referral source --

10 **SPECIAL MASTER:** But to use Mr.
11 Placitella's term, isn't the custom and practice that
12 when those cases were sent from the referral source
13 to, for example, your client, Mr. Bevan, it came as a
14 completed package, it would have the plaintiff, it
15 would have the medical records, it would have the
16 experts' reports, so that your client would then only
17 have to file a complaint and move on from there.

18 **MR. LITTLE:** Not necessarily. That's
19 not my understanding.

20 **SPECIAL MASTER:** Not necessarily, okay.

21 **MR. LITTLE:** And even if that were the
22 case, Mr. Bevan could engage his own experts.

23 **SPECIAL MASTER:** Well, he could have.
24 But did he?

25 **MR. PLACITELLA:** Yes.

1 **MR. LITTLE:** And --

2 **SPECIAL MASTER:** Mr. Placitella?

3 **MR. PLACITELLA:** As I understood it,
4 every case got an independent expert that was
5 ultimately accepted and audited by numerous asbestos
6 trusts.

7 **SPECIAL MASTER:** Okay. So when you say
8 every case, you mean every Bevan case?

9 **MR. PLACITELLA:** Every Bevan case.

10 **SPECIAL MASTER:** Is that true
11 across-the-board?

12 **MR. PLACITELLA:** I have no idea.

13 **SPECIAL MASTER:** At least the --

14 **MR. PLACITELLA:** We're talking about
15 Bevan's cases, right.

16 **SPECIAL MASTER:** Okay.

17 **MR. ASSAF:** And, your Honor, so -- and I
18 certainly believe what Mr. Placitella says.

19 But there also came a time where,
20 because of federal courts both in the Grace trust and
21 in the Raymark case, excluding the doctors that came
22 with the package, okay, and what I've read is it was
23 a package, because that's what the ABA refers to.

24 **SPECIAL MASTER:** That's what I thought.

25 **MR. ASSAF:** So there came a time where

1 it would have been malpractice not to try to get
2 another doctor because these doctors were being
3 excluded.

4 **MR. PLACITELLA:** So he has them. He's
5 had cases approved by the trust way after all this by
6 independent experts. These are valid cases.

7 **SPECIAL MASTER:** We're not being kind to
8 Mr. Little, who's been very patient.

9 **MR. LITTLE:** Your Honor, the analogy is
10 if in a case a party were to seek information about
11 the attorney's sanction history and try to admit that
12 as evidence as to whether the underlying claims are
13 or are not valid, it simply is not something that
14 would ever be admissible in the underlying case.

15 If you want to impugn the credibility of
16 the evidence, it is the experts. And that is
17 information that not only my understanding is that
18 BASF already has, but that's not reflected in the
19 field that is in dispute. It's reflected in a
20 different field that was part of a proposal that was
21 made during the meet and confer process.

22 **SPECIAL MASTER:** When this database is
23 reduced to a spreadsheet, how many columns does it
24 have?

25 **MR. LITTLE:** My understanding is that

1 it's not 350, but 415.

2 **MR. FARRELL:** I have a copy here, your
3 Honor, if you'd like to see it.

4 **SPECIAL MASTER:** Okay.

5 **MR. LITTLE:** Yeah, 415 I believe.

6 **MR. PLACITELLA:** 415.

7 **MR. FARRELL:** That is the entry just for
8 one of the putative class representatives.

9 **SPECIAL MASTER:** For William Clark?

10 **MR. FARRELL:** Correct.

11 **SPECIAL MASTER:** Well, Nancy Pease, did
12 I pronounce that correctly? P-E-A-S-E.

13 **MR. FARRELL:** Yes. What I don't think
14 is --

15 **SPECIAL MASTER:** There's a lot of
16 information here that I frankly don't think is all
17 that important. I think it would have been
18 important under the underlying case, but not in this
19 case.

20 Okay. Can I hold onto this for a
21 minute?

22 **MR. FARRELL:** Yes, your Honor.

23 **SPECIAL MASTER:** Thank you.

24 I'm sorry, Mr. Little, we keep
25 interrupting you.

1 **MR. LITTLE:** That's okay. I finished
2 on that point.

3 The only other thing that I want to
4 differentiate is the difference between what I
5 understand the Cahill database to be and the
6 authority that might govern its production and the
7 Bevan database. You asked about authority
8 previously.

9 And unlike -- with the Cahill database,
10 and this is only my own understanding from reading
11 the parties' briefing on the issue, is that it
12 reflected information that Cahill received on behalf
13 of BASF from the parties that had filed or submitted
14 claims against it. So that information by its very
15 nature is not privileged.

16 In addition, the work product protection
17 over that database is owned by two parties to this
18 lawsuit and so it's not subject to Rule 45.

19 The difference with the Bevan database
20 is that Rule 45 contains mandatory language that work
21 product -- and in this case I don't think that
22 there's a dispute that this is information that was
23 compiled and arranged by attorneys in anticipation of
24 litigation.

25 Rule 45 contains mandatory language,

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1 Rule 45(d)(2), that says that the Court must protect
2 that information from disclosure.

3 There is a second category below that, I
4 believe that's paragraph 3 of that same rule, that
5 says that the Court may limit or impose restrictions
6 on production of trade secret and proprietary
7 information and several other categories.

8 So there is authority that puts the
9 Bevan database in a different position than the
10 Cahill database, and that is that the information in
11 that database is received in part from the firm's own
12 clients. And it is an internal database that
13 contains the information that that law firm felt to
14 be crucial to that case.

15 And it is the privilege, whether it's
16 work product or attorney/client, is owned by a
17 non-party that is subject to this additional
18 protection under Rule 45.

19 And so I just want to make clear that
20 that's what distinguishes the Cahill database.

21 **SPECIAL MASTER:** What part of Rule 45
22 are you relying on? Because I don't see it. And I
23 just looked at it. I don't see it providing the kind
24 of expansive protection that you seem to be reading.
25 And I'm happy to hand it to you.

1 **MR. LITTLE:** Sure, that would be --

2 **SPECIAL MASTER:** And I think you want to
3 be looking at the lefthand side page. No, the other
4 lefthand. There you go.

5 **MR. LITTLE:** I'm referring to (d)(3).

6 **SPECIAL MASTER:** Okay.

7 **MR. LITTLE:** On a timely motion, the
8 Court must quash or modify a subpoena that requires
9 disclosure of privileged or other protected matter if
10 no exception or waiver applies.

11 And so with regard to the named
12 plaintiffs, I understand that the Court has ruled
13 that there's been some sort of limited waiver.

14 With regard to --

15 **SPECIAL MASTER:** That was --

16 **MR. LITTLE:** -- the putative class
17 members --

18 **SPECIAL MASTER:** -- Chief Judge Linares
19 decided that.

20 **MR. LITTLE:** Right, some amount of
21 waiver. It's unclear to me how extensive that is or
22 what that applies to.

23 But that's not the issue presented in
24 this motion. In this motion we're dealing with
25 non-parties who have not had an opportunity to retain

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1 their own counsel, to opt out of this litigation, and
2 should not be bound by a decision that essentially
3 opens the door on their work product and privileged
4 information.

5 **SPECIAL MASTER:** Now, tell me a little
6 bit more about your work product argument. Because
7 when I look at these databases, when they are
8 produced in a format that human beings can read, they
9 really very much look like summaries under the
10 Federal Rules of Evidence, where the summary is
11 admissible if the information that is set forth in
12 the summary is too voluminous to use.

13 The creation of a summary doesn't make
14 it work product. It just makes it a summary.

15 How is this a work product?

16 **MR. LITTLE:** Correct.

17 **SPECIAL MASTER:** I mean, when you as a
18 lawyer decide that you're going to make stuff more
19 easily digestible to you, how is that work product,
20 just because you happen to be a lawyer?

21 It's just like not every conversation
22 that you have as a lawyer is attorney/client
23 privileged. Not everything that you do is work
24 product protected.

25 So tell me how this database, and I'm

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1 waving what Mr. Farrell let me look at, how this
2 database somehow is work product for you.

3 **MR. LITTLE:** Correct. And there's two
4 bases for that.

5 And the first basis is that the
6 information that is being summarized is itself work
7 product or privileged either because it was received
8 from the client or from a consulting expert as
9 opposed to a testifying expert or somebody working on
10 behalf of the lawyer. And much of that
11 information --

12 **SPECIAL MASTER:** Well, that doesn't make
13 it work product. That makes --

14 **MR. LITTLE:** That makes it privileged.

15 **SPECIAL MASTER:** -- it privileged.

16 Correct.

17 **MR. LITTLE:** And in the other category
18 is the fact that the information that was chosen and
19 selected for this database reflects the attorney's
20 decision about what information is crucial to that
21 client's case.

22 And so there is in the Third Circuit a
23 selection and incorporation doctrine that I believe
24 applies to this database.

25 But some of the information contained in

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1 this also is the same kind of information that would
2 be reflected in any case memorandum that an attorney
3 would prepare for the file in any of our cases.

4 The fact that it's arranged in
5 relational databases that can be sort of called upon
6 to produce reports containing, you know, specific
7 information, doesn't make it any different than any
8 other internal document that's prepared for
9 litigation.

10 **SPECIAL MASTER:** And correct me if I'm
11 wrong, but is what Mr. Farrell handed over to me, is
12 that typical of the categories and of the fields in
13 this database?

14 **MR. LITTLE:** I believe that reflects all
15 of the possible fields.

16 **SPECIAL MASTER:** Okay. So if I said to
17 Mr. Farrell, Mr. Farrell, identify for me the six
18 fields that you really want by way of information,
19 and we narrow everything down to the point where some
20 if not all of your concerns go away, would that plus
21 a 502(d) order satisfy your concerns?

22 **MR. LITTLE:** Well, I don't think that I
23 can --

24 **SPECIAL MASTER:** It's hard -- I'm asking
25 you a question in the abstract.

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1 **MR. LITTLE:** -- walk back from the --
2 from the position we're taking on the database. It
3 would obviously be better than --

4 **SPECIAL MASTER:** Than a full-blown --

5 **MR. LITTLE:** -- producing the whole
6 thing.

7 **SPECIAL MASTER:** Okay.

8 **MR. LITTLE:** But, you know, for the
9 record --

10 **SPECIAL MASTER:** So amputation is better
11 than just capital punishment?

12 **MR. LITTLE:** We'll take anything we can
13 get.

14 **SPECIAL MASTER:** Okay. Mr. Farrell,
15 you only get to use one sheet of comments from Mr.
16 Assaf, okay, so pick the better one.

17 **MR. FARRELL:** I will do my best, your
18 Honor.

19 And I came in this morning and I was
20 going to say that the theme of the day was going to
21 be the sauce for the goose, sauce for the gander that
22 you identified from our brief, but I think your Honor
23 actually --

24 **SPECIAL MASTER:** I stole your thunder.

25 **MR. FARRELL:** You actually came up with

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1 a better theme than I did, which was the Groundhog
2 Day point, because I think much of what we've heard
3 over the last hour plus is material that's already
4 been argued for months and rejected.

5 We heard scope of discovery and
6 forfeiture of discovery, which has been rejected
7 multiple times by Chief Judge Linares and by your
8 Honor.

9 We heard Rule 1.6 confidentiality, which
10 has been rejected by the Court I think at least twice
11 at this point.

12 **SPECIAL MASTER:** The last time I said
13 it's a court order and therefore under New Jersey
14 law, which is what applies, you need to disclose.

15 **MR. FARRELL:** Exactly. And we've heard
16 arguments about prematurity and so on and so forth.

17 What I think would be helpful is exactly
18 where I think the Court was heading, which is how do
19 we resolve this?

20 And I think much of what we heard this
21 morning was really off base from what the dispute
22 we're actually talking about is.

23 And so I want to just try to make three
24 points, because I think it brings us back to what the
25 actual dispute is.

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1 First, the plaintiffs you'll remember
2 vigorously demanded the Cahill databases. When they
3 demanded them, there were no limitations imposed.
4 They didn't say I only want the entries for the six
5 putative class reps, I only want the entries for the
6 30 Bevan people that the Court ordered. It was
7 everything.

8 **SPECIAL MASTER:** That's okay, because
9 lawyers are entitled to say do I what I say, not what
10 I do. So, okay, that's -- I understand that.

11 **MR. FARRELL:** So the plaintiffs set the
12 scope when it comes to the databases. All we're
13 asking is that they live by the scope they
14 established.

15 Point two, most of the information in
16 the database both the plaintiffs and Bevan have
17 agreed to produce.

18 The dispute here is really about three
19 categories of information. Most of the argument you
20 heard about work product and this and that, we've
21 already passed it because there's already been
22 agreement to produce multiple categories of
23 information out of the database for all of the Bevan
24 clients. And when I say all of the Bevan clients --

25 **SPECIAL MASTER:** Okay. So there's been

1 agreement to produce certain categories of
2 information.

3 **MR. PLACITELLA:** No.

4 **SPECIAL MASTER:** What are they?

5 **MR. PLACITELLA:** There's no agreement.

6 **SPECIAL MASTER:** Well, there may not be
7 with you, Mr. Placitella.

8 **MR. PLACITELLA:** There was no agreement
9 with him either. There was a proposal made that was
10 reached --

11 **SPECIAL MASTER:** Wait. Fine. He says
12 there was. You say there weren't.

13 **MR. ASSAF:** What does Mr. Roth say?

14 **SPECIAL MASTER:** Mr. Roth, somebody's
15 putting you on the spot.

16 **MR. ROTH:** And I'm happy to be on the
17 spot, your Honor.

18 We were -- what we discussed was
19 those -- produce the e-mails, that there were areas
20 in this database that would be privileged and that we
21 would not produce. That's what was discussed.

22 **MR. ASSAF:** And that everything else
23 would be produced.

24 **MR. ROTH:** Well -- and that's what I
25 wrote, that we wouldn't have a problem with that,

1 your Honor.

2 **SPECIAL MASTER:** Okay. And what are
3 those areas?

4 **MR. ROTH:** I'm sorry?

5 **SPECIAL MASTER:** What are those areas
6 that would be produced?

7 **MR. ROTH:** Well, it's actually the
8 ones that -- oh. It's easier to go with ones that
9 are not going to be produced.

10 **SPECIAL MASTER:** No, no. For me it's
11 easier to go with the ones that would be produced,
12 because my order is going to say: You're going to
13 produce X, Y, and Z. So I'm going to need to know
14 what it is that you agree on. Think about it for a
15 moment.

16 Mr. Assaf is going to play with his
17 machine --

18 **MR. ASSAF:** I'm just --

19 **SPECIAL MASTER:** -- and Mr. Farrell's
20 going to continue his --

21 **MR. ASSAF:** I'm just going to pull up
22 Mr. Roth's e-mail.

23 **SPECIAL MASTER:** That's all right. If
24 that's helpful, that's fine. But you can do that
25 while Mr. Farrell continues.

1 **MR. ROTH:** Gene, why don't you just
2 forward it to me?

3 **SPECIAL MASTER:** Okay. So you guys can
4 play electronics while Mr. Farrell speaks.

5 **MR. FARRELL:** There were multiple
6 discussions and agreements. One example that we
7 noted in our brief, because we had to change our
8 brief at the last minute because we reached an
9 agreement, was on whether the plaintiffs had been in
10 silica litigation and were they going to keep that
11 information out or not. Mr. Roth agreed to include
12 it.

13 So the reason our brief focused on three
14 areas, three key areas, but three areas nonetheless,
15 is because there had been agreement on everything
16 else.

17 I'm now hearing for the first time that
18 that agreement supposedly didn't exist. But be that
19 as it may.

20 Now let's talk about the three areas,
21 because I think they illustrate the problem here.

22 I appreciate that neither plaintiffs nor
23 Bevan wants to produce the information. But as your
24 Honor correctly recognized, unless there's a basis
25 for withholding it, which it's their burden to

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1 satisfy, they can't withhold it just because it's bad
2 for them or they don't feel like producing it.

3 So let's talk about each of the three
4 things. The referring attorney. Well, Mr. Little
5 tried to draw a distinction between information
6 received from a client as opposed to received from a
7 third party and argued that, well, information that
8 comes from the clients is special.

9 Well, the identity of the referring
10 attorney certainly didn't come from Mr. Bevan's
11 clients. That came from a third party. And I don't
12 see how it could be privileged or confidential. It's
13 certainly not a trade secret, as your Honor
14 mentioned.

15 So if I walk through all of the examples
16 that I've heard this morning about basis for
17 withholding, none of them apply to the referring
18 attorney. And that's all the more true given the
19 discovery confidentiality order we have here.

20 To the extent that Mr. Placitella is
21 even concerned about reputational harm, the example
22 he gave about a defense lawyer referring Mr. Roth a
23 case, I'm sure they will designate this information
24 confidential or attorneys' eyes only under the
25 discovery confidentiality order.

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1 And I assume that would address all of
2 the concerns they have about reputational issues or
3 whatever may flow from it.

4 The key point is there's no privilege
5 basis or work product basis for withholding referring
6 attorney.

7 Two, settlements, and I think these
8 actually fall into two categories, so let me take
9 them in two stages because I think it matters.

10 One, are the settlements in the claims
11 made on bankruptcy trusts?

12 We met and conferred on this with Mr.
13 Roth and with Mr. Little. They both acknowledged
14 that bankruptcy trusts are not confidential.

15 The reason we cited the Ohio statute
16 that we cited was not to say that it applies here and
17 that this is a personal injury case, but to
18 illustrate the fact that these trusts are not deemed
19 confidential by anybody.

20 And in fact, if the federal bankruptcy
21 court had said they're confidential and they can't be
22 produced, I very much doubt that the Ohio state could
23 then say I now demand that you produce it. It
24 doesn't work that way.

25 These bankruptcy trusts are not

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1 confidential submissions. They're communications
2 with third parties, both the submission to the trust
3 and the information received from the trust, so it's
4 also not privileged.

5 So you have no confidentiality, you have
6 no privilege, and you have no work product.

7 I don't see any basis for withholding
8 any of the information related to the bankruptcy
9 trusts, including the amounts that have been received
10 from those trusts, because there's no confidentiality
11 in place.

12 So then that leaves category three,
13 which is the other settlements, the settlements with
14 non-bankruptcy entities.

15 **SPECIAL MASTER:** Well, was there any
16 other compensation received by the Bevan plaintiffs?

17 **MR. FARRELL:** Essentially yes, which I
18 presume that most -- looking at the database
19 entries, I presume that most of them would be
20 entities other than bankruptcy trusts, such as other
21 defendants from the litigation.

22 Now, we heard extensive argument from
23 Mr. Placitella this morning that somehow BASF already
24 has this information.

25 I don't see how it can both be true that

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1 the information is subject to a confidentiality
2 agreement but BASF already has it from 25 years ago.
3 One of those two things is not correct. I don't
4 know why --

5 **SPECIAL MASTER:** Well, the argument that
6 Mr. Placitella advances in respect of that is really
7 a proportionality argument, if I can put it in our
8 new terms as of a year and a half ago. You know,
9 whether getting that information is proportional to
10 the needs of the case because, says Mr. Placitella,
11 you already have that information somewhere along the
12 way. And that's how I understood his argument.

13 **MR. FARRELL:** And I don't believe --

14 **SPECIAL MASTER:** And he's shaking his
15 head up and down, meaning that I finally got one
16 right.

17 **MR. PLACITELLA:** You got many things
18 right.

19 **SPECIAL MASTER:** Thank you.

20 **MR. PLACITELLA:** Just not everything
21 here so far.

22 **SPECIAL MASTER:** Stick with me. We're
23 not done yet, Mr. Placitella.

24 **MR. FARRELL:** With the exception of some
25 of the talc co-defendants, which your Honor may

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1 remember us discussing at the October hearing, where
2 BASF may have had some information about what other
3 talc companies were paying in those cases, I don't
4 think it's correct that we have information about
5 what non-talc non-bankruptcy entities would have been
6 paying to the plaintiffs in those cases.

7 We have asked now for a year for the
8 plaintiffs to identify even one confidentiality
9 agreement that would restrict the production of the
10 information or that couldn't be addressed through the
11 discovery confidentiality order we have. And we've
12 seen none.

13 And in fact, your Honor just heard again
14 this morning Mr. Placitella acknowledging that some
15 of those settlements at a minimum are not subject to
16 confidentiality.

17 Given that it is their burden to prove
18 up some basis for withholding the information, they
19 haven't met the burden and in fact have acknowledged
20 that the argument doesn't apply to the chunk of the
21 information that we're after.

22 The last point I would make is the point
23 that I made to your Honor in December when we were
24 here discussing the Rothenberg issues.

25 And I thought one of the most important

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1 pieces of the plaintiffs' opposition on the Bevan
2 database actually was on the last page of their brief
3 where they told the Court: Hey, none of this should
4 preclude us from later relying on this very same
5 information. And I thought that was a pretty telling
6 statement.

7 It seems pretty clear, your Honor, that
8 the plaintiffs are planning to use this sort of
9 information. And they need to. The reason they need
10 to, as we explained in our motion, is that the six
11 class representatives have either mesothelioma and
12 lung cancer, but 90 plus percent of the putative
13 class does not.

14 It will be the non-malignant claims that
15 were at issue with the National Tire Worker
16 Litigation Project that are the subject of all of the
17 discussion the Court has seen about fraudulent
18 doctors, diagnoses with no actual basis, and most
19 importantly I think for the present dispute, the
20 amount of compensation that would have been received
21 in those cases.

22 **SPECIAL MASTER:** But aren't we really
23 being told by plaintiffs' counsel: Read between the
24 lines, wait until you get our class cert motion,
25 that's going to define what the class is that we're

1 seeking and may in fact moot many of the issues that
2 are before us. Isn't that really sort of the
3 subtext of what plaintiffs' counsel are saying?

4 **MR. FARRELL:** Well, we're two weeks away
5 at this point, your Honor. And I would think that
6 Mr. Placitella would be in a position to tell us
7 today are the non-malignant claims out of the class.
8 If they are, then we're happy --

9 **SPECIAL MASTER:** Well, I'm not going to
10 ask him to do that today, because he has until the
11 29th.

12 **MR. FARRELL:** Okay. Well, then we're
13 left in the position of needing to seek the
14 information, because as of today they're supposedly
15 in the class. And as of today, we have only three
16 and a half months of fact discovery to go and we need
17 to get this information.

18 Otherwise, we're going to have no
19 discovery in this case at all on potential damages
20 and the sorts of reliance and causation issues with
21 respect to the non-malignant claims that we're
22 talking about.

23 **SPECIAL MASTER:** I understand your
24 concern. But hopefully you also understand at least
25 from the way that this matter has been handled up

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1 until now, that if there is a deferral for two weeks
2 to allow all of us to know what plaintiffs' counsel
3 will be proposing in the way of a class, that I will
4 not allow that to prejudice the defense. You're
5 going to get your opportunity to get what you need
6 and you're going to get it quickly.

7 And it frankly might be easier to do
8 then because then we really will know what the
9 contours of the ballpark that we're going to be
10 playing in are.

11 And I hope that you're fairly confident
12 on your side that even though you have a limited time
13 period within which to do to conduct your discovery,
14 discovery will move quickly and delays are not going
15 to be acceptable from anybody. And I mean that.
16 Anybody.

17 I will tell you that at the last time
18 that we discussed this issue, we deferred it because
19 I was told by counsel that you were going to work it
20 out. If I had -- and it didn't work out. That's
21 fine. We address it now.

22 But I will tell you that if I had
23 ordered the discovery and it had not been produced, I
24 am perfectly ready, willing, and able to start
25 imposing sanctions, because I've said it before, I

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1 will say it again. This case needs to move. And
2 I'm not going to brook delays based upon folks'
3 recalcitrance with complying with orders that are
4 issued after a matter has been briefed and argued and
5 you've been heard.

6 You can disagree with me all you want.
7 That's perfectly fine. And if you disagree with me
8 enough, there is a methodology for you to get review
9 of my decisions. Good luck on that. But there is a
10 methodology.

11 And that's what we're going to follow.
12 Otherwise we're going to move this case along. And
13 it's not going to be at anybody's prejudice.

14 This case is almost seven years old.
15 Everybody in this case is entitled to know what the
16 other side's case is going to be about, specifically
17 in respect of class certification.

18 Plaintiffs have a heavy burden to
19 satisfy class cert requirements, particularly in this
20 circuit.

21 And defendants have every right to poke
22 holes into that. That's what makes it a lawsuit.

23 The fact that the complaint was filed is
24 not an invitation for the other side to lay down.
25 You got to expect that the other side is going to

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1 fight you back and that everybody has their burden to
2 prove. So we're going to keep moving on this as
3 best we can.

4 Let me make this suggestion. Putting
5 aside -- Mr. Assaf is going to have a heart attack
6 if I don't let him speak, so --

7 **MR. ASSAF:** Well, I --

8 **SPECIAL MASTER:** So to avoid the heart
9 attack --

10 **MR. ASSAF:** Well, I'd like the Roth
11 exception to multiple people raising points, because,
12 your Honor, if Mr. Placitella is going to sit there
13 in silence, it's inconceivable that this class is not
14 going to include the Bevan people and the Bevan
15 database. This is their case.

16 And so to just -- so two weeks of delay
17 so that we could come back here and then negotiate
18 how it's going to be produced --

19 **SPECIAL MASTER:** That's not going to
20 happen.

21 **MR. ASSAF:** Because I would like to say,
22 your Honor, they know Bevan is their case. Okay.
23 We've seen Rothenberg. It's Rothenberg and Bevan.
24 And Rothenberg, I don't know what's going to happen
25 there. Bevan is their case.

1 And so they're sitting there knowing,
2 okay, that that's going to be part of their case.
3 And now we're just going to wait until we get this
4 database.

5 And the point I wanted to pick up, Mr.
6 Farrell did a great job as usual, but I did want to
7 say when they agreed -- Mr. Roth and I have just been
8 exchanging e-mails. When they've agreed to produce
9 the database save three key issues, okay, that's
10 really inconsistent with the notion that the database
11 can't somehow be reformed to produce it without
12 whatever fields.

13 **SPECIAL MASTER:** If it's computer
14 information, it can be manipulated --

15 **MR. ASSAF:** Correct.

16 **SPECIAL MASTER:** -- every which way
17 possible.

18 **MR. ASSAF:** Correct.

19 **SPECIAL MASTER:** So --

20 **MR. ASSAF:** And so on the National Tire
21 litigation -- the National Tire Workers Litigation
22 Project, I'm not trying to oversell that, but I
23 just -- I get my shot to test the parameters of what
24 these people are and whether they in fact had valid
25 claims.

1 **SPECIAL MASTER:** No question. The
2 question that is presently at issue is whether now is
3 the right time for that.

4 **MR. ASSAF:** And here's why --

5 **SPECIAL MASTER:** Okay. That's the only
6 issue as far as I'm concerned.

7 If the case gets certified or in the
8 process of that, you're going to get the right to
9 look at that and take your shot.

10 The question is are you going to get
11 that today or some day after today?

12 **MR. ASSAF:** So that's what -- so maybe
13 I'm just misunderstanding again. I think I get that
14 shot before certification. I don't -- not after --
15 Mr. Placitella is suggesting I get it after.

16 **SPECIAL MASTER:** That's not the
17 question. The question is do you get it before the
18 motion for certification is even filed.

19 **MR. ASSAF:** Okay. Because it's not
20 going to come as any surprise, in the Widener case,
21 which you're familiar with --

22 **SPECIAL MASTER:** I'm sure that this
23 issue is not going to go away.

24 **MR. ASSAF:** Correct.

25 **SPECIAL MASTER:** Okay. It's the

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1 Heimlich case. You called it Widener.

2 **MR. ASSAF:** Correct.

3 **SPECIAL MASTER:** It's Widener Law

4 School. Judge Walsh put the brakes on that and the
5 Third Circuit agreed, so...

6 **MR. ASSAF:** Correct. And again, I
7 don't have to lay it all the out now for your Honor.
8 But if it turned out that a large number of that
9 putative class were part of a scheme to submit false
10 LSAT scores, that would be relevant to the class cert
11 hydrogen peroxide analysis.

12 And so all I'm saying is -- and I know
13 we're going to get to this on the interrogatories, we
14 have -- I think it's May 10th or May 15th. And I
15 hear what your Honor's saying about things set in
16 stone.

17 I don't understand the burden to start
18 producing this, because I can tell you on February
19 1st when we come back here, there's going to be a
20 long story about how long it takes to get it to us.

21 **SPECIAL MASTER:** But if that's the case,
22 they may not get my normally sympathetic ear, so --
23 look, I'm trying --

24 **MR. ASSAF:** I know.

25 **SPECIAL MASTER:** -- to get the case

1 moving, okay. I'm not carrying water for anybody
2 except for Chief Judge Linares, okay, because he's
3 the only one who can get cranky at me, and that
4 matters, okay.

5 You can all get cranky at me, but it
6 really doesn't matter. So that's what I'm trying to
7 do.

8 **MR. ASSAF:** I understand.

9 **SPECIAL MASTER:** And I think everyone
10 understands that. And so work with me. Help me
11 get you where you need to be. I've said that
12 before. I'm going to say it again. Work with me.
13 Help me get you what you need. And I will try to do
14 that.

15 Anyone else? Mr. Roth?

16 **MR. ROTH:** Just two things. One, to
17 respond to -- I didn't get an e-mail from you, but I
18 sent you an e-mail from me --

19 **MR. ASSAF:** Correct.

20 **MR. ROTH:** -- where I identified those
21 databases that -- or those fields that we said were
22 not discoverable.

23 **SPECIAL MASTER:** Okay.

24 **MR. ROTH:** And I'm happy to send that to
25 your Honor.

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1 **SPECIAL MASTER:** No. What I want you to
2 do -- we're going to take a short break. And what I
3 want you, Mr. Roth, either one of you, Mr. Assaf or
4 Mr. Farrell, and Mr. Little, because again, you're
5 picking at his client's carcass, to go through this
6 list and tell me specifically which fields you agree
7 to produce, okay, knowing full well that you disagree
8 on the three fields that are at issue here.

9 I'm going to tell you right now I'm not
10 going to order the production of 450 fields of
11 information. That's not going to happen.

12 **MR. FARRELL:** Well, can I speak to just
13 that point, your Honor? Because I think there's a
14 bit of a misconception about the number 450.

15 **SPECIAL MASTER:** It doesn't matter what
16 the number is. You're going to look through this
17 list and you're going to highlight -- and I'm to give
18 you the list and I'm going to give you a highlighter.
19 Okay. You're going to highlight the fields that you
20 guys agree can be produced. I'm sure you can
21 modify -- since this is a relational database, I'm
22 sure you can modify what the net result is when you
23 produce the spreadsheet.

24 And once we define what the categories
25 are, I know that there are three categories you're

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1 not going to agree on, so I'm going to have to rule
2 on them, and we'll work off of that.

3 But first let's try to make sure that we
4 define what the scope is of what's being requested
5 here, try to get agreement on that as much as
6 possible, and then I'll address the three areas.

7 And if people want to talk more after
8 that, that's fine. But for now, why don't we try to
9 use that time profitably.

10 **MR. PLACITELLA:** I just want to correct
11 the record on one thing --

12 **SPECIAL MASTER:** Yes.

13 **MR. PLACITELLA:** -- about the Cahill
14 database. The Cahill database was supposed to have
15 been produced in response to my request for give me
16 the records that you have as to why cases were
17 dismissed. That was why it -- am I wrong?

18 **MR. ASSAF:** Yes, you are wrong.

19 **MR. PLACITELLA:** Okay. Well, tell me
20 why it wasn't produced then.

21 **SPECIAL MASTER:** I'm sorry. Before we
22 get into that, I have a feeling that that's what a
23 friend of mine who likes the ballet would call a
24 lateral arabesque. It's not central to the dance.

25 I don't know how that helps us here, Mr.

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1 Placitella. So maybe you can tell me that first.

2 **MR. PLACITELLA:** We'll have our break
3 and then we'll come back.

4 **SPECIAL MASTER:** Okay. Thank you.
5 Here's the list that you gave me. I'm going to find
6 you a highlighter -- well, that's a blue one. Those
7 are horrible. Can we get a yellow one? There
8 should be one down there.

9 **MR. ASSAF:** And, your Honor, so it's not
10 going to surprise you, the point on the 450, if they
11 sued 120 defendants, each defendant could have three
12 categories: Date complaint filed, check received,
13 check sent, check cashed.

14 **SPECIAL MASTER:** Okay.

15 **MR. ASSAF:** So that's why it gets up
16 into the hundreds so quickly.

17 **SPECIAL MASTER:** All right. Well, I
18 looked at it. And they seemed pretty -- pretty --
19 what's the word I'm searching for? Pretty granular
20 in the information. So that's kind of where we were.

21 But let's use this time profitably.

22 (Break.)

23 **SPECIAL MASTER:** I just want to confirm
24 that the categories are correct.

25 **MR. ROTH:** Well, actually, your Honor,

1 there are a couple things that are -- that were
2 changed after this. So let me --

3 **SPECIAL MASTER:** Okay. So why don't you
4 tell me what the categories are.

5 **MR. ROTH:** Right. Let me just say --
6 and what you have asked us to do and what I had done
7 with Mr. -- I'm sorry, what I had done with Mr. Assaf
8 and with Mr. Farrell after our November conference
9 with your Honor was essentially some E-electronic and
10 telephone meet and confers.

11 We objected in front of your Honor to
12 producing the database. We said perhaps there was a
13 way to work this out. These are putative class
14 members. And we went down into the woods on certain
15 things.

16 So we said for purposes of reaching an
17 agreement, which we never did, here is what we will
18 not produce. I've said it that way, your Honor,
19 because the version that you now have has factors
20 that are -- or fields that are highlighted with red.
21 Those are the fields we believe are not discoverable
22 from the Bevan database.

23 **SPECIAL MASTER:** Okay. But make my
24 life easier.

25 **MR. ROTH:** Yes, sir.

1 **SPECIAL MASTER:** Tell me which fields
2 you've agreed to produce.

3 **MR. ROTH:** Okay.

4 **SPECIAL MASTER:** Because those are what
5 are going to appear in the order.

6 **MR. ROTH:** Okay.

7 **SPECIAL MASTER:** Mr. Reiley's going to
8 take notes, and what he puts in the way of notes is
9 what's going to be in the order, so slowly and
10 patiently. Please.

11 **MR. ROTH:** Yes, sir. For the record,
12 what we would have been willing to produce, even
13 though we dispute its discoverability --

14 **SPECIAL MASTER:** I assume that you
15 dispute the discoverability of everything. But at my
16 request, you're kindly agreeing to produce the
17 following.

18 **MR. ROTH:** Well, subject to your Honor's
19 order, we would produce -- we were willing to agree
20 to the following: NS, AA --

21 **SPECIAL MASTER:** What is NS?

22 **MR. ROTH:** I don't remember. And I was
23 told that they're not really filled, the fields
24 aren't really filled.

25 **SPECIAL MASTER:** Well, let me try this,

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1 okay, because I'm going to look at this and maybe get
2 some sense out of it.

3 We're going to get the first and last
4 name of the original claimant?

5 **MR. ROTH:** Yes.

6 **SPECIAL MASTER:** We're going to get the
7 first and last name of whoever their representative
8 plaintiff is. Right?

9 **MR. ROTH:** Yes, sir.

10 **SPECIAL MASTER:** Okay. We're going to
11 get the address for the -- and I say representative
12 plaintiff, not in the sense of class representative,
13 but in the sense of somebody standing in the shoes of
14 a decedent.

15 Okay. So we're going to get the
16 address for that. We're going to get the cause of
17 death. We're going to get alternate contact, the
18 primary employer and the location of the primary
19 employer, the year they started employment, the year
20 their employment ended, their occupation, their
21 primary and/or secondary diagnoses.

22 **MR. ASSAF:** Film quality.

23 **SPECIAL MASTER:** I'm sorry?

24 **MR. FARRELL:** Yes, film quality and ILO
25 are going to be important fields for non-malignant

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1 claims, your Honor.

2 **SPECIAL MASTER:** Okay. Film quality and
3 ILO, whatever ILO may be.

4 **MR. FARRELL:** It's an organization that
5 has standards for reading chest x-rays to determine
6 whether they show markings or indicia of asbestos.

7 **SPECIAL MASTER:** Okay. And what's the
8 state number? What is that?

9 **MR. ROTH:** That's the docket number.
10 There's a claim number.

11 **SPECIAL MASTER:** Okay. And then the
12 date filed for that claim number and whether there
13 was a worker's comp. claim filed and a settlement,
14 the primary diagnosis date, secondary diagnosis date,
15 the doctor or secondary doctor.

16 I don't know what product ID means.

17 **MR. ROTH:** How you prove that they
18 were -- what the product was that they were exposed
19 to.

20 **SPECIAL MASTER:** Okay. And memo, what
21 does that mean?

22 **MR. ROTH:** I don't know, your Honor.
23 Probably related to the product ID.

24 **SPECIAL MASTER:** Okay. PFT?

25 **MR. FARRELL:** It's probably pulmonary

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1 function test. The next several fields, PFT,
2 physical exam, SVC, SEV, 1, TLC --

3 **THE REPORTER:** Mr. Farrell, excuse me,
4 when you read the letters like that -- if you'd start
5 again, I'd appreciate it.

6 **MR. FARRELL:** Let me take them slower.

7 **THE REPORTER:** Just because they're
8 letters, I don't know if they're separated or all
9 together.

10 **MR. FARRELL:** These again are all going
11 to be relevant to the non-malignant claims,
12 presumably.

13 PFT is probably pulmonary function test.
14 Physical exam presumably is just physical exam. FVC
15 is again a lung function reading. FEV 1 to FVC
16 ratio is again a lung function reading, as is TLC and
17 DLCO.

18 So if that information is available,
19 which it should be for anybody who's claiming
20 asbestosis or a similar non-malignant condition, the
21 plaintiffs have indicated they will produce it.

22 **MR. PLACITELLA:** It's not available for
23 everybody.

24 **SPECIAL MASTER:** Okay.

25 **MR. PLACITELLA:** Nor should it be. I'm

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1 just telling you as a matter of medical science, they
2 don't do a reading for PFTs for everybody.

3 **SPECIAL MASTER:** Okay. And then we go
4 to the next page where we have CUY, underscore CTY,
5 underscore date, underscore PD.

6 So it's Cuyahoga County, date of what?
7 What's PD stand for? Is that probate?

8 **MR. ROTH:** I believe these are the
9 probate filings, your Honor, yes.

10 **SPECIAL MASTER:** Okay. Because
11 underneath it's got probate approval, probate amount,
12 probate fee paid, probate fee description, Medicare
13 lien resolved, Medicare lien paid, Medicare lien I
14 assume it's decision.

15 **MR. ROTH:** Right.

16 **SPECIAL MASTER:** Medicare lien --
17 Medicare underscore PLRP, Medicare underscore PLRP
18 underscore PD, Medicare underscore PLRP underscore
19 DESCR, I assume that's description. Group, I don't
20 know what group that is, but it's group. Unfiled
21 POA, is that power of attorney or something else?

22 **MR. ROTH:** I believe that's power of
23 attorney, your Honor.

24 **SPECIAL MASTER:** Okay. Medicare
25 underscore SBMT. Probate, that's I assume whether a

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1 claim was submitted to Medicare. Probate attorney,
2 meds underscore received, secondary underscore
3 employer, secondary underscore years underscore EMP
4 underscore. I assume that's years employed. Then
5 we go through a lot of deletions.

6 **MR. FARRELL:** In the middle of the
7 deletions --

8 **SPECIAL MASTER:** Did I miss something?

9 **MR. FARRELL:** -- are the two fields talc
10 check number and talc check amount.

11 **SPECIAL MASTER:** Okay.

12 **MR. FARRELL:** There's no page numbers,
13 unfortunately, but in the mass of a bunch of redacted
14 fields.

15 **MR. REILEY:** It's the second to last one
16 I think.

17 **SPECIAL MASTER:** Okay. I didn't get
18 that far I don't think. There they are. Okay.

19 We have talc underscore CHK underscore
20 no, which is talc check number. And then talc
21 underscore CHK underscore amount, which I guess is
22 talc check amount.

23 And then we get into other information,
24 packs underscore per underscore day, which I assume
25 is how many packs a day somebody smoked cigarettes.

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1 Year underscore began, I assume the year they started
2 smoking. Year underscore stopped. Year they
3 stopped smoking. VA underscore lien. Is that
4 Veterans Administration?

5 **MR. FARRELL:** That is, your Honor.

6 **SPECIAL MASTER:** Then military
7 underscore quest, underscore received, which I guess
8 an inquiry from the military. That's what quest
9 means, question or --

10 **MR. ROTH:** It may be a questionnaire
11 that was sent to the client from the firm.

12 **SPECIAL MASTER:** Okay. Well, whatever
13 it is, you've agreed to include it.

14 **MR. ROTH:** Let me be clear about agreed
15 to include it, because I don't want -- again, your
16 Honor, I think you understand our position, but you
17 know --

18 **SPECIAL MASTER:** But assuming that I
19 order it, you're going to produce this, of course
20 subject to a Federal Rule of Evidence 502(d) order.

21 **MR. ROTH:** Yes, your Honor. We don't
22 want this transcript floating around that plaintiffs'
23 counsel has agreed to give putative class members'
24 discovery information to the defendants in this case
25 now or ever.

1 **SPECIAL MASTER:** You're being very
2 accommodating because I twisted your arm.

3 **MR. ROTH:** Okay.

4 **SPECIAL MASTER:** Military underscore
5 service. Branch underscore of underscore service.
6 Service underscore start underscore date. These
7 seem self-evident. Service underscore end
8 underscore date. Basic underscore training
9 underscore site. Basic underscore training
10 underscore city. Basic underscore training
11 underscore state. Basic underscore started. Basic
12 underscore ended. Military underscore base.
13 Location underscore of underscore military underscore
14 base. Base underscore started. Base underscore
15 ended. Location underscore of. Underscore military
16 underscore base, 2. And then the same thing,
17 started and ended. Same thing in regard to military
18 base 3. Ship underscore service. Name of ship.
19 Years underscore on underscore ship. And then the
20 same thing for ship number 2. Name underscore of
21 underscore transport underscore ship. That's for
22 those people in the poor Army who get shipped around
23 by the Navy. Transport underscore ship underscore
24 years. Search underscore last, last name, search
25 underscore first, first name. Post underscore 1980.

1 I don't know what that means. And apparently
2 neither does anyone else. And then filing sheets,
3 whatever that may be.

4 **MR. FARRELL:** Post 1980 is presumably
5 whether Medicare can assert a lien or not against
6 settlements.

7 **SPECIAL MASTER:** Okay. And that then
8 leaves us with the three categories that were at
9 issue here today. And those are the identity of the
10 referring attorney, whether any of the Bevan
11 plaintiffs qualified for or received payments from an
12 asbestos settlement trust, and compensation received
13 by the Bevan plaintiffs regardless.

14 In respect of those three, nothing has
15 been presented that would justify withholding the
16 information concerning the referral attorney.

17 As I said very early on, I do not
18 believe that that is a trade secret. I do not
19 believe that it is confidential.

20 But in order to protect whatever
21 concerns may be, any production made of the database
22 will be done pursuant -- for attorneys' eyes only
23 pursuant to the confidentiality disclosure order.
24 And that should resolve any concerns as to that. So
25 that will be produced.

1 The second category is whether the Bevan
2 plaintiffs qualified for or received payment from an
3 asbestos settlement trust.

4 The fact of having qualified or received
5 payment is not confidential in my view. The amount
6 may be. But the fact is not.

7 So disclosure of the fact of having
8 qualified for or received payment from an asbestos
9 settlement trust will be produced, again, subject to
10 a confidentiality discovery order.

11 And finally, whether the Bevan
12 plaintiffs received any compensation other than from
13 the settlement trust. And again, the fact of that
14 will be produced, not the amount.

15 Now, that said, this entire order will
16 be subject to Federal Rule of Evidence 502(d), which
17 specifically will say, and the order will contain the
18 language, that the privilege or protection that has
19 been asserted is not waived by disclosure connected
20 with the litigation pending before this Court, in
21 which event the disclosure is also not a waiver in
22 any other federal or state proceeding.

23 So no one's waived anything here.

24 **MR. PLACITELLA:** And is not precedent
25 for any other application, because they've already

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1 announced that once they get the information here,
2 they intend to go to Kansas and California and do the
3 exact same thing. And that's the slippery slope
4 that we're on.

5 **SPECIAL MASTER:** You need to help me
6 with that, Mr. Placitella, because I don't understand
7 what that --

8 **MR. PLACITELLA:** BASF is taking the
9 position that they're entitled to this information.

10 It's our position they're entitled to
11 none of it from putative chase members. And we
12 preserve our right to appeal as if it was ordered.

13 They've taken the further position that
14 once they get the information here, they're going to
15 seek similar information as relates to other
16 plaintiffs around the country.

17 **SPECIAL MASTER:** Well, they can do that
18 in other cases, subject to --

19 **MR. PLACITELLA:** No, I'm talking about
20 in this case.

21 **SPECIAL MASTER:** Well --

22 **MR. PLACITELLA:** In this case. They've
23 announced in briefing --

24 **SPECIAL MASTER:** Let us jump up off that
25 bridge if and when we get to it.

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1 But I will tell you that my decision is
2 limited to what is in front of me right now. If
3 something else happens in respect of it later on, I
4 will address it then.

5 But I want everybody to understand that
6 what I tried to do was to come up with a compromise
7 that respected everybody's rights while still moving
8 the case forward. So that's going to be my order.

9 If the plaintiffs think that they need
10 to seek review of that order, that's up to you.

11 **MR. PLACITELLA:** Thank you, your Honor.

12 **MR. FARRELL:** Can I raise one minor
13 point, your Honor --

14 **SPECIAL MASTER:** Sure.

15 **MR. FARRELL:** -- that I think falls
16 within the compromise you just outlined, but I just
17 wanted to be clear on it.

18 On the very last page of the database
19 entries document you were just reading from, the
20 third to last field is settlements underscore total.
21 And then there's a number provided there.

22 I think that that field could be
23 produced respecting the compromise your Honor laid
24 out since it does not identify the party that the
25 settlement came from or any individual defendant.

1 It's just giving a total amount for the plaintiff as
2 opposed to parties who may be on the other side of
3 confidentiality agreements.

4 **SPECIAL MASTER:** That may become
5 relevant later on. Not right now.

6 **MR. ASSAF:** And following up on that
7 comment, your Honor, I don't -- I won't say I know
8 where you're going with this, but let me put this on
9 the record because I think there's going to be an
10 issue from the meet and confer.

11 On the individual amounts of the various
12 settlements, at the meet and confer just now that you
13 ordered, we said okay, but you are to be then
14 precluded from having an expert or anybody else now
15 rely on those individual amounts since you've
16 prevented us from getting them.

17 And they -- and I think there's some
18 uncertainty. And all I'd like is just some clarity
19 that if they're going to use the settlement amounts
20 through their experts, I actually get them when they
21 start looking at them as opposed to getting an expert
22 report that says: Oh, I've been churning this data
23 for four months and here's what I found.

24 **SPECIAL MASTER:** Mr. Assaf, you know as
25 well as I do that if they rely on an expert, you're

1 entitled to everything that that expert relied on.
2 Basic discovery. So if an expert relied upon
3 something that has not been disclosed, you're
4 entitled to that.

5 And you'll make arguments then that not
6 only go to the substance but also the process. And
7 we'll entertain those when and if they occur.

8 **MR. ROTH:** There's one other point, your
9 Honor, to raise about our meet and confer, which was
10 to the extent that your Honor was going to order
11 production of part of the fields of the database for
12 putative class members, that we want it to be clear,
13 and I believe we are, I just wanted to report to your
14 Honor.

15 I don't know how many of the Bevan firm
16 clients are run through this database. And I'm not
17 suggesting that any of us do.

18 I wanted it to be clear because it's
19 something that we had talked about producing all of
20 the clients. And a lot of that was just because I
21 don't know that anybody was thinking about it. I
22 don't think anybody was trying to gain unfair
23 advantage or any of that kind of thing.

24 But given your Honor's order, it relates
25 to putative class members, not every asbestos client

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1 that's ever been in the Bevan firm, only people who
2 may be part of this class.

3 **SPECIAL MASTER:** Well, as currently
4 defined --

5 **MR. ROTH:** Yes your Honor.

6 **SPECIAL MASTER:** -- which is pretty much
7 anybody who was within the neighborhood of some
8 asbestos at any time in the last 40 years.

9 **MR. ROTH:** Well, that's not true.

10 **MR. PLACITELLA:** That's not true.

11 **MR. ROTH:** It's actually related to
12 people who may have had talc claims.

13 **SPECIAL MASTER:** Okay.

14 **MR. ROTH:** I mean, we pled a pretty
15 broad complaint --

16 **SPECIAL MASTER:** You did.

17 **MR. ROTH:** -- but it's not that broad,
18 your Honor.

19 **SPECIAL MASTER:** You did. I thought it
20 was -- but, you know, I have the number ingrained in
21 my head. It's paragraph 278.

22 **MR. PLACITELLA:** It will be more focused
23 in two weeks.

24 **MR. ROTH:** Well, we also agree that it's
25 related to talc.

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1 **SPECIAL MASTER:** No, I lied. I did not
2 get that right. I thought it was 278. Where's the
3 definition? Oh, here it is. 286. All persons in
4 the United States and its territories who were
5 exposed to BASF's talc and/or talc products sustained
6 asbestos related injury and prior to the commencement
7 of this litigation either (A) filed a lawsuit or
8 other claim for compensation against BASF and by
9 reason of BASF's statements that its talc and talc
10 products did not contain asbestos or that there was
11 no evidence its talc and talc products contained
12 asbestos settled, withdrew, voluntarily dismissed, or
13 suffered an involuntary dismissal of such lawsuit or
14 claim for compensation; or (B) by reason of BASF's
15 statements that its talc and talc products did not
16 contain asbestos or that there was no evidence it
17 contained asbestos did not file a lawsuit or other
18 claim for compensation against BASF. Period.

19 The class shall also include those who
20 have had or had the right to claim damages
21 derivatively based upon such exposed person's
22 asbestos related injury.

23 Okay. That's the class definition that
24 we operate on until Mr. Placitella is going to
25 surprise all of us two weeks from today with a far

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1 more limited class.

2 Right, Mr. Placitella? Don't answer
3 that.

4 Anything else on that application?

5 Good.

6 Let's go to the motion concerning the
7 interrogatories. On December 15, 2017, under ECF
8 285, BASF filed a motion to compel answers to
9 interrogatories -- I'm sorry, Mr. Little, I didn't
10 see you.

11 **MR. LITTLE:** Your Honor, if the Bevan
12 firm's presence is no longer required.

13 **SPECIAL MASTER:** Does that mean you're
14 going to deny us the joy of your presence?

15 **MR. LITTLE:** With your permission of
16 course.

17 **SPECIAL MASTER:** Of course.

18 **MR. LITTLE:** Thank you very much.

19 **SPECIAL MASTER:** You're going to work
20 with these folks in getting --

21 **MR. LITTLE:** Absolutely.

22 **SPECIAL MASTER:** -- the information?
23 Thank you very much. I appreciate you coming down.
24 Have a safe a trip home.

25 **MR. LITTLE:** Yeah. Thanks for

1 accommodating my trial schedule.

2 **SPECIAL MASTER:** That's why I wanted to
3 take you first, because you don't have a dog in the
4 fight for the rest of this.

5 **MR. LITTLE:** Thank you, your Honor. I
6 appreciate that.

7 **SPECIAL MASTER:** We have two sets of
8 interrogatories that are at issue.

9 The first set of interrogatories was
10 propounded on October 23rd, 2015. And the second set
11 of interrogatories was propounded on November 7,
12 2017.

13 In respect of the first set of
14 interrogatories, BASF states that the plaintiffs have
15 failed to supplement their answers after subsequent
16 discovery rulings and that the August 3, 2017,
17 decision by Chief Judge Linares re a waiver had the
18 result that answers were to be provided pursuant to
19 the proposed form of order that was submitted.

20 We can do very short work of that.
21 Everyone consents to the entry of that proposed form
22 of order. So we're not going to spend a whole lot
23 of time talking about the first set of
24 interrogatories.

25 **MR. FARRELL:** I think the proposed order

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1 was overtaken by the amended interrogatories that
2 were provided by the plaintiffs, which in our view
3 were still deficient and were the subject of the
4 e-mail that we sent to your Honor.

5 **SPECIAL MASTER:** Okay. We'll come back
6 to that.

7 **MR. FARRELL:** Okay.

8 **SPECIAL MASTER:** You guys and your
9 e-mails.

10 In respect of the second set of
11 interrogatories, BASF states that they are seeking
12 what plaintiffs' alleged damages are, plaintiffs'
13 alleged, quote, original, unquote, documents, and
14 third, facts in support of plaintiffs' class action
15 or class certification motion, which has not yet been
16 filed.

17 As to damages, which are addressed in
18 interrogatory 1 of the second set, BASF seeks the
19 amount of damages, the method of calculating damages,
20 the basis for calculating damages, and how the
21 damages here differed from damages sought in the
22 underlying cases.

23 In respect of the original documents,
24 which is interrogatory number 4 of the second set,
25 basically BASF says that we were required to produce

1 originals, they should be required to produce
2 originals. And their complaints as to originals
3 we're just repeating, which may not have been the
4 best thing for you guys to say.

5 The third category is class
6 certification. And those are interrogatories 2, 3,
7 5, 6, 7, and 8 of the second set of interrogatories
8 that seeks information about the putative class and
9 class certification.

10 And BASF says we're fine if that
11 information gets produced contemporaneous with the
12 filing of the class certification motion.

13 Now, you said that at the time when you
14 thought that was happening today. But I'm sure that
15 you'd be happy to get it two weeks from today also.

16 On December the 20th under ECF 390,
17 scheduling order number 4 set forth the schedule for
18 the filing of oppositions and replies.

19 On December 27, 2017, under ECF 396 the
20 plaintiffs filed their opposition where they agreed
21 to the entry of the proposed consent order, which was
22 docketed under ECF 384-12.

23 Therefore, the motion in respect of the
24 first set of interrogatories was moot.

25 The problem is I have since then

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1 received an e-mail dated January 5, 2018, from Mr.
2 Farrell that basically says we got non-answers. I
3 think that was more kindly said than you said it.

4 In respect of the second set of
5 interrogatories, the plaintiffs allege that the
6 second set of interrogatories are premature and the
7 current responses are sufficient and proper.

8 In respect of interrogatory number 1,
9 again we're talking about the second set of
10 interrogatories, that they are unnecessary and
11 premature, that they deal with damages and we're not
12 there yet.

13 And in respect of interrogatories 2, 3,
14 5, 6, 7, and 8, those too are premature. These deal
15 with the Rule 23 certification requirements.
16 According to plaintiffs, these are beyond the mandate
17 of hydrogen peroxide, that there will be ample
18 opportunity for discovery once the class
19 certification motion is filed, that the allegations
20 of the inadequacy of the class reps is not supported
21 by law and has nothing to do with pre-certification
22 motion discovery.

23 The plaintiffs state that the request
24 that they serve verified responses with their class
25 certification motion should be denied, that

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1 interrogatory number 4 about original documents seeks
2 information that's not relevant to claims or
3 defenses.

4 On January 3, 2018, under ECF 397, BASF
5 in reply says the information sought is not
6 premature, and again, this is as to the second set of
7 interrogatories, that interrogatory number 1 is not
8 premature and seeks basic damages information that
9 should already have been disclosed, that
10 interrogatories 2, 3, 5, 6, 7, and 8 seek basic Rule
11 23 information, that interrogatory 4, which deals
12 with original documents, response to or is prevented
13 by further discovery concerning BASF's original
14 documents, and in respect of the first set of
15 interrogatories it suggests that the order should be
16 supplemented.

17 Now, to go to Mr. Farrell's January 5,
18 2018, e-mail, where BASF comments on plaintiffs'
19 supplemental/amended answers to the first set of
20 interrogatories. And he lists seven problems with
21 them. First, that the general objections remain
22 unchanged.

23 Second, in respect of interrogatory
24 number 1, not a single person is in fact named.

25 Third, that in respect of interrogatory

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1 number 4, the settlement with other entities without
2 details is not helpful.

3 Number 4, interrogatory number 12, there
4 was no change in the response whether there was a
5 decision to settle with Engelhard.

6 In respect to number 5 in respect of
7 interrogatory number 13, the efforts re the
8 prosecution of claims against Engelhard, nothing
9 substantive was changed in the answers.

10 Number 6, that there were no amended
11 responses or answers to interrogatories concerning
12 plaintiff Wengerd.

13 And number 7, that the Pease and Ware
14 responses were verified by non-parties without any
15 substitution of parties having occurred.

16 It's your motion. If you want to tell
17 me something I don't already know, please feel free.

18 **MR. FARRELL:** I think your Honor
19 accurately summarized what our position is, so I
20 won't go back through the whole thing.

21 You did initially note that when we said
22 that for the second set of interrogatories we said
23 that January 15th would be acceptable. Here we are
24 on January 15th. I assume we're not getting a second
25 set of interrogatories today. The point --

1 **SPECIAL MASTER:** No, because I think the
2 discussion was we'll give it to you when we file our
3 motion for class cert.

4 **MR. ASSAF:** Correct.

5 **SPECIAL MASTER:** And since that moved
6 two weeks, I assume that plaintiffs also would move
7 that response date two weeks.

8 **MR. FARRELL:** Well, that was the point I
9 wanted to make is that plaintiffs' opposition
10 actually said they won't even give us the responses
11 with their class motion, that the responses would
12 come at some undefined point later in time.

13 **SPECIAL MASTER:** Well, okay, that date's
14 not going to be undefined, so you can get past that.

15 **MR. FARRELL:** Okay. So the crux of the
16 issue is there's no factual information provided at
17 all and no timeline for provided providing it.

18 Your Honor correctly noted that it falls
19 into three categories. And let me speak to each of
20 the three briefly because I think some of them are
21 easier to knock out than others.

22 First, on plaintiffs' damages, which is
23 interrogatory number 1 in the second set, it's really
24 not a class related interrogatory. It's about the
25 six plaintiffs' individual damages. There's no

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1 prematurity issue or any other issue that turns on
2 the class motion.

3 In fact, Rule 26(a) calls for the
4 disclosure of damages information as one of the very
5 first things that is supposed to occur in discovery
6 in a case.

7 That hasn't occurred here. And we did
8 get initial disclosures, but no damages information
9 was provided.

10 Your Honor raised this issue as well at
11 the October 2017 hearing. And plaintiffs couldn't
12 answer the Court's questions about what their theory
13 of damages was.

14 All we're saying is here we are several
15 months into the discovery, regardless of whether a
16 class could be or would be certified in this case,
17 we're entitled to the plaintiffs' theory and basis
18 for their individual damages claim. And that hasn't
19 been provided.

20 So I don't think that one turns on the
21 timing of the class motion at all. It should just be
22 ordered to provide the information to the defendants
23 since it's long overdue given what Rule 26(a) says.

24 **SPECIAL MASTER:** Okay. Are you done
25 with interrogatory 1?

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1 **MR. FARRELL:** Yes.

2 **SPECIAL MASTER:** Who's responding on
3 plaintiffs' behalf?

4 **MR. ROTH:** Mr. Coren.

5 **SPECIAL MASTER:** Whoa. I think you just
6 got thrown under the bus there, Mr. Coren.

7 **MR. ROTH:** No, I'm kidding, your Honor.
8 I just wanted to see --

9 **SPECIAL MASTER:** See if he was still
10 awake.

11 **MR. ROTH:** See that reaction.
12 Your Honor, we do view it as part of the
13 class issue here. And the reason being that --

14 **SPECIAL MASTER:** Let me ask you this
15 question.

16 **MR. ROTH:** Yes, sir.

17 **SPECIAL MASTER:** Are you going to
18 respond to interrogatory number 1 in the second set
19 in a meaningful way on the 29th of this month?

20 **MR. ROTH:** All of the information
21 regarding the class and how we intend to prove it I
22 believe is --

23 **SPECIAL MASTER:** That's not my question
24 to you. My question to you is --

25 **MR. ROTH:** Do you mean in addition to --

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1 **SPECIAL MASTER:** My question to you is I
2 was given one representative set of interrogatories
3 which were as to plaintiff Kimberlee Williams. And I
4 assume that identical --

5 **MR. ROTH:** Correct.

6 **SPECIAL MASTER:** -- were issued as to
7 each one of the named representative plaintiffs.

8 And interrogatory number 1 says, and I
9 quote: Describe all damages, losses, harm, or other
10 relief which you, it's capital Y, which is defined as
11 Miss Williams, contend BASF is responsible, including
12 but not limited to: (A) the amount of damages, loss,
13 harm, or other relief, (B) the method for calculating
14 that damage, loss, harm, or other relief, (C) the
15 basis for calculating that damage, loss, harm, or
16 other relief, and (D) how that damage, loss, harm, or
17 other relief differs if at all from the damages
18 decedent claimed in his original complaint in the
19 underlying action. And decedent is a defined term
20 and underlying action is a defined term.

21 Are you going to produce responses in
22 respect of all six of the named representative
23 plaintiffs that answer interrogatory number 1 on
24 January 29th?

25 **MR. ROTH:** I don't know, your Honor.

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1 And I don't think so.

2 **SPECIAL MASTER:** Okay.

3 **MR. ROTH:** I mean, unless there's an
4 order obviously.

5 **SPECIAL MASTER:** Okay.

6 **MR. ROTH:** But --

7 **SPECIAL MASTER:** If there's an order
8 will you provide it?

9 **MR. ROTH:** Let the record reflect I'm
10 smiling, your Honor.

11 And if there's an order, I would. But I
12 would submit to your Honor that it remains premature
13 given what the nature of this class may be and --

14 **SPECIAL MASTER:** Well, but you're going
15 to be able to define that -- I mean, regardless of
16 how the class is defined, you have six representative
17 plaintiffs who are named. Okay.

18 Interrogatories have been propounded to
19 each one of those representative plaintiffs. And
20 the answer is: Are those representative plaintiffs
21 whose case goes on with or without a class
22 certification motion, whether you're going respond in
23 respect of those six?

24 And don't answer, because you did answer
25 already. You said: If I get ordered to I will.

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1 So I guess the ball is now in my court.

2 **MR. ROTH:** Well, my hesitation, your
3 Honor, was only one with respect to timing. Will we
4 answer those? Yes, we will.

5 But I am not certain, your Honor, that
6 we will have the trial expert testimony, which would
7 be part of a damage -- a response to damages
8 interrogatories prepared for these individual
9 plaintiffs.

10 **SPECIAL MASTER:** Okay.

11 **MR. ROTH:** And that's really what my
12 hesitation was. Not if, but when.

13 **SPECIAL MASTER:** All right. Well,
14 you're going to do the best you can, I'm sure.

15 But I will note for the record that
16 these interrogatories were originally propounded on
17 November the 7th of 2017. So they have been out
18 there for over two months.

19 **MR. ROTH:** Yes, your Honor.

20 **SPECIAL MASTER:** All right. That
21 deals with interrogatory number 1 of the second set.

22 Talk to me about, Mr. Farrell, about
23 interrogatory number 4.

24 **MR. FARRELL:** So this deals with the
25 question of original documents. And on this one we

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1 tried to explain the background for the issue in the
2 brief.

3 But if I could just expand on that
4 briefly, our view, the defendant's view or BASF's
5 view is that the original documents issue is frankly
6 a red herring. It's one that the plaintiffs have
7 created. And they created it because they initially
8 alleged in this case that BASF had destroyed all
9 sorts of relevant information, all sorts of documents
10 concerning the talc business.

11 BASF then found hundreds of those
12 documents and produced them. And so plaintiffs then
13 shifted their position and said: Well, you found
14 copies but you didn't find originals, where originals
15 they mean I want the actual blue ink version of this
16 document from 1975, not the copy that you found. So
17 we have --

18 **SPECIAL MASTER:** Okay. You can stop
19 there.

20 Mr. Roth, tell me the basis of your
21 argument based on Federal Rule of Evidence 1003.

22 **MR. ROTH:** For which part, your Honor?
23 We have produced --

24 **SPECIAL MASTER:** Demanding -- the whole
25 business about producing documents that are either

1 originals or copies.

2 **MR. ROTH:** That we demanded?

3 **SPECIAL MASTER:** No. They've demanded
4 it from you.

5 **MR. ROTH:** Right. We've produced
6 copies, your Honor. They're talking about
7 originals.

8 **SPECIAL MASTER:** They're saying if you
9 have originals --

10 **MR. ROTH:** They're upset that we had
11 sought original documents like micrographs. They're
12 upset that we had reason to question when original
13 documents were produced, for instance, learning about
14 a piece of correspondence months after depositions
15 were done.

16 They're upset that we made a defendant
17 or the successor to a defendant search for original
18 evidence and now have sought from the victims of a
19 fraud perpetrated originals, not copies.

20 **SPECIAL MASTER:** Alleged fraud. Fraud
21 hasn't been proven yet.

22 **MR. ROTH:** I'm sorry, I thought I -- it
23 is an alleged fraud, your Honor. You're correct.

24 And so they're upset that we have sought
25 that information, particularly where some of these

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1 original documents are relevant.

2 We have -- or may be relevant, your
3 Honor, in the form of actual scientific results from
4 studies that are done.

5 The quality is different if it is an
6 original or a copy. And I'll let Mr. Placitella
7 speak to that if you need more information.

8 There is no basis for -- so now they
9 have sought to have these people who are not the
10 original plaintiffs in the underlying cases go look
11 for originals because the copies that we produced are
12 apparently not adequate.

13 It is disproportional. It is for the
14 purpose of, you know, getting back at the lawyers who
15 have sought information.

16 **SPECIAL MASTER:** So they're just being
17 cranky is what you're saying?

18 **MR. ROTH:** Okay.

19 **MR. FARRELL:** It's not function of being
20 cranky and it's not a function of being upset, your
21 Honor. The issue --

22 **SPECIAL MASTER:** I know you're never
23 cranky. But Mr. Assaf gets cranky every so often.

24 **MR. FARRELL:** Well, he's not even cranky
25 about this one.

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1 **MR. ASSAF:** No, I'm not, because it's
2 just -- believe me.

3 **MR. FARRELL:** This is again in the
4 category of goose and gander. The plaintiffs'
5 demands of BASF were not limited as just described by
6 Mr. Roth to photomicrographs and so on.

7 The deposition that Mr. Placitella
8 referred to of the BASF corporate representative that
9 lasted for three days, a notice that has been served
10 in this case too on identical grounds calls for
11 things like the original, quote/unquote, deposition
12 transcripts from 1983.

13 **SPECIAL MASTER:** Help me out here, Mr.
14 Farrell. None of that has occurred in this case.

15 **MR. FARRELL:** It has occurred in this
16 case.

17 **SPECIAL MASTER:** Okay. Has it occurred
18 since I've been appointed?

19 **MR. FARRELL:** No.

20 **SPECIAL MASTER:** Okay. Because my
21 answer would have been very simple. Those of us who
22 learned evidence from Irving Younger, and there are
23 few of us old enough in this room to say that, know
24 about the best evidence rule, okay, which is codified
25 in the federal rules, Rule 1002, 1003.

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1 And it basically says that unless you
2 are attacking the authenticity of the copy, a copy is
3 just as good as an original.

4 And I haven't heard anybody attack the
5 authenticity of a copy, that it somehow was marked up
6 in a way that changed it from the original or
7 something goofy happened in respect of it.

8 So I would have said: Why are you
9 arguing about originals, unless you're telling me
10 that something awful happened to the original and
11 therefore there's a problem.

12 So if the sauce is good for the goose
13 and the gander, I would say to you what I would have
14 said to them had the application been before me,
15 which is: Come on, guys, it's the year of our Lord
16 2018. We are well past documents being done by
17 scribes using quill pens. Copies are used all the
18 time.

19 I can tell you at this firm as well as
20 I'm sure all of the firms involved in this lawsuit,
21 you know, nobody keeps paper copies anymore.
22 Everything's electronic. And when you need it, you
23 print it out.

24 So let's not get too crazed about that.

25 **MR. FARRELL:** I couldn't agree more,

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1 your Honor. And I think we said as much in our
2 papers. If the original, quote/unquote, documents
3 issue is removed from the case and the copies are as
4 good as originals, we are more than happy with that.

5 **SPECIAL MASTER:** Well, why don't we wait
6 to see what Mr. Placitella and Mr. Roth produce. If
7 there's a problem in respect of the authenticity of
8 the copies, we'll deal with those.

9 **MR. ROTH:** Your Honor, we've been
10 producing documents. We've identified the documents
11 we've produced.

12 The dispute here is originals. And
13 let's be clear. And I don't -- only because Mr.
14 Farrell has raised it. We haven't filed a motion on
15 this. It is not before your Honor.

16 This is not a goose/gander situation.
17 Number 1, we've got clients who were told their cases
18 were meaningless or nonexistent. It's the Rosenblit
19 situation. What they have, they have. We've
20 produced it.

21 Number 2 -- and again, I don't want to
22 get into -- I forget the ballet phrase that you used.

23 **SPECIAL MASTER:** Lateral arabesque.

24 **MR. ROTH:** Okay. I don't want to --
25 I'm throwing a little bit of a lateral arabesque.

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1 But the difference is --

2 **SPECIAL MASTER:** You don't look well
3 doing it.

4 **MR. ROTH:** With or without a beard.
5 The --

6 **SPECIAL MASTER:** Did I throw you off?
7 Sorry.

8 **MR. ROTH:** Again, there's so much to
9 unpack here, your Honor.

10 **SPECIAL MASTER:** I know.

11 **MR. ROTH:** I have myself in tights. I
12 used to be able to --

13 **SPECIAL MASTER:** Oh, please. That's
14 way -- that's a hundred thousand dollars right there
15 of psychiatric treatment. So let's not go there.

16 **MR. COHEN:** It will take weeks to get
17 that image out of my head.

18 **MR. ROTH:** Some of the discovery
19 depositions, for instance, that had been at issue
20 that were taken in the 80s, we haven't gotten all the
21 exhibits. There have been pages missing. That's a
22 fight for another day.

23 But I highlight for your Honor and I
24 appreciate your reminder about the best evidence
25 rule, which should have been number one in my

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1 response.

2 **SPECIAL MASTER:** I wondered why no one
3 raised it. And I figured that just those of us who
4 had the benefit of Irving Younger as our teacher
5 would know that.

6 **MR. FARRELL:** BASF, your Honor, last
7 been raising it for approximately five years in
8 response to Mr. Placitella's demand for original,
9 quote/unquote, documents from 40 years ago that we
10 have copies and copies are as good as originals.

11 That is what gave rise to our
12 interrogatory was the fact that Mr. Placitella was
13 not satisfied by the copies and has claimed to have a
14 standard for spoliation that rises and falls on
15 having the blue inked original documents as opposed
16 to copies is what brought us to the goose/gander
17 issue of if that's the standard for spoliation, then
18 Mr. Placitella needs to live by it as well.

19 **MR. ROTH:** And our clients have not been
20 accused of spoliating evidence.

21 **SPECIAL MASTER:** Well, they don't know
22 yet. And that's their point. They don't know enough
23 to be able to say that.

24 **MR. ROTH:** As we sit here now, your
25 Honor, they have not been, nor do they have the same

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1 duty that BASF has. And I think --

2 **SPECIAL MASTER:** Well, all parties have
3 a duty to preserve evidence that they intend to rely
4 on or that the other side should have been able to
5 rely on. We all agree to that.

6 We also need to all agree that we need
7 to stop this tit-for-tat stuff. Okay. It's
8 unbecoming to everybody. It's just unbecoming.

9 And I understand, believe me, I
10 understand that when you're in the middle of a swamp
11 and you're up to your rear end in alligators, it's
12 hard to remember that your purpose was to drain the
13 swamp.

14 But we're trying to drain the swamp
15 here, guys. So let's try to keep our eye on that
16 prize and make sure we get to where we need to go.

17 I think I've made it clear enough what I
18 think is the standard for admissibility of documents.
19 I don't think that Chief Judge Linares has a
20 different view of that. So how about we stick to
21 that.

22 If you get a copy -- and I'm telling
23 this to everybody. If you get a copy and you have a
24 legitimate reason to think that there is something
25 wrong with that copy, then absolutely you have the

1 right to demand the original.

2 But short of that, in this day and age,
3 I will tell you I have tried entire cases where every
4 document that was produced in the courtroom, and
5 there were hundreds of thousands of them, were done
6 electronically. There wasn't a piece of paper in the
7 courtroom.

8 And if you could do that at trial, you
9 certainly ought to be able to do that in discovery.

10 Yes, Mr. Placitella?

11 **MR. PLACITELLA:** I agree with what your
12 Honor said.

13 Mr. Farrell as an advocate does not
14 accurately state my position. And that is not an
15 accurate characterization of my position.

16 And when he files his motion for summary
17 judgment on spoliation, I will articulate my position
18 adequately. And I will tell you that it will be
19 consonant and consistent with what you've articulated
20 here.

21 **SPECIAL MASTER:** Well, that means that
22 you're a very smart guy. Okay.

23 So now that we have resolved -- and
24 we're going to come back to these -- but
25 interrogatories 2, 3, 5, 6, 7, and 8 of the second

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1 set. These are class cert interrogatories. What's
2 the problem with those?

3 **MR. ROTH:** I'm sorry?

4 **SPECIAL MASTER:** What's the problem with
5 responding to those?

6 **MR. ROTH:** We'll respond to those, your
7 Honor. But it's all going to be information that's
8 going to be in our class cert motion.

9 **SPECIAL MASTER:** Okay. But you're going
10 to file amended answers to interrogatories 2, 3, 5,
11 6, 7, and 8 of the second set of interrogatories on
12 the 29th of this month?

13 **MR. ROTH:** No, your Honor. There
14 are --

15 **SPECIAL MASTER:** Yes, you are.

16 **MR. ROTH:** Well, what I meant, your
17 Honor, was --

18 **SPECIAL MASTER:** I tried to say that
19 politely, but you're not letting me.

20 **MR. ROTH:** Not withstanding --

21 **SPECIAL MASTER:** This is like having a
22 discussion with your wife. You're not going to win,
23 okay.

24 **MR. ROTH:** Right. And you know what
25 the challenge is, your Honor. It's the same thing I

1 have when I have a conversation with my wife. I
2 think it's actually a conversation. Right. I
3 understand that now, your Honor. It's not. But --

4 **SPECIAL MASTER:** It's like when my wife
5 says to me: You don't want dessert, do you?

6 **MR. ROTH:** Right.

7 **SPECIAL MASTER:** Okay.

8 **MR. PLACITELLA:** I'm going to just jump
9 in here and try to save the both of you --

10 **SPECIAL MASTER:** Okay.

11 **MR. PLACITELLA:** -- on the wife issue
12 and move on.

13 **SPECIAL MASTER:** Okay. Thank you.

14 **MR. ROTH:** Each and every person who
15 filed an action against BASF based upon their
16 exposure to Amtal talc, at this point, your Honor,
17 that's information that we do not yet have. What we
18 do --

19 **SPECIAL MASTER:** Do the best you can.

20 **MR. ROTH:** Well, what we know is that's
21 information that Kirkland & Ellis and BASF have.

22 **SPECIAL MASTER:** But they're entitled to
23 test that information based upon your information.

24 The mere fact that they already have
25 that information does not relieve you as a party to

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1 this lawsuit to producing information that's in your
2 control.

3 **MR. ROTH:** The information that we
4 have -- well, that's fine, your Honor. I submit to
5 you -- because I can tell you now without a plaintiff
6 who doesn't know and will be relying on counsel's
7 advice that we're not going to be able to answer the
8 question of who each and every person is who filed a
9 lawsuit against BASF.

10 **SPECIAL MASTER:** But what I do know is
11 that you're going to do the best you can.

12 **MR. FARRELL:** As your Honor might have
13 guessed, part of the reason we asked the question is
14 because we thought the answer would be they don't
15 know.

16 **SPECIAL MASTER:** They don't know.
17 Listen, everything --

18 **MR. ROTH:** And that's right. And that's
19 going to be the answer for some of these -- for
20 these. And that isn't relevant to the issue of
21 whether or not we can get the class we seek certified
22 at this point in time.

23 **SPECIAL MASTER:** All right.

24 **MR. ROTH:** Is it possible for us to
25 learn that? Yes, it is. Do we need to know it to

1 get class certification or for the case to move
2 forward? Respectfully, no, we don't.

3 **SPECIAL MASTER:** Okay. Well, I'll make
4 this clear again --

5 **MR. ROTH:** Oh, no, I got it.

6 **SPECIAL MASTER:** -- when I issue the
7 decision. But I'm not asking anybody to make things
8 up. I'm asking you to do the best you can to give
9 us meaningful responses to the interrogatories.

10 And candidly, I think the rule of thumb
11 everybody should follow is think if I were
12 propounding these interrogatories, what kind of
13 response, what caliber of response would I like to
14 see back? Okay. It's a variant of the golden rule.
15 Use that as your standard and you'll be fine with me
16 as far as -- I'm not going to ask you to produce
17 what you don't have. I'm not going to ask you to
18 produce something there's no way you can know it.

19 But what I am going to ask you to do is
20 to do the best you can under the circumstances. And
21 if you can't, you can't. Tell us that. And we'll
22 deal with it.

23 And if you can produce 50 percent but
24 not 100 percent, tell us that too.

25 But what I want to see is a legitimate,

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1 bona fide effort by people to respond to
2 interrogatories. I want to see answers that are
3 responsive. And I'm going to get to that in one
4 moment. But they need to be responsive, because to
5 give everybody fair notice, if we have to revisit
6 these issues, they will come with sanctions. Okay.
7 I don't want to do that.

8 I think you've gotten a sense already
9 from me that that's not the way I like to operate.

10 But at some point or another, and it
11 applies to everybody in this lawsuit, at some point
12 or another people got to do what they've got to do
13 and that which they are obliged to do under the
14 rules. And that is provide meaningful answers. And
15 in doing so, do the best that you can. And if you
16 can't respond to something, say why you can't.

17 But using amorphous language, to put in
18 a lot of words and say nothing is not helpful. It's
19 just not helpful.

20 Just like I find people do general
21 objections and they throw everything and the kitchen
22 sink in. There are courts, federal courts in this
23 country that will sanction you if you do that. They
24 won't give you a second chance. You're going to get
25 sanctioned.

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1 And in fact, there are some judges I
2 know that if you use any general objections, they
3 will sanction you because they don't think that
4 that's satisfactory based upon a party's obligations
5 to disclosure under the rules.

6 Now, I'm not going to be that crazed, at
7 least not in respect of that point.

8 But we need to get answers. They
9 propounded interrogatories properly. It's the
10 obligation of the responding party to respond. And
11 if you want to object, you can object. But unless
12 you have a legitimate objection, you have to respond.

13 And frankly, I'm of the view that even
14 if you have an objection, you state your objection,
15 but then you say without waiving the objection,
16 here's the answer. And do the best that you can.

17 **MR. ROTH:** Which we have done in some of
18 these responses, your Honor. And I point to
19 interrogatory number 6.

20 But I understand your Honor's comments
21 and look forward to hearing your Honor's order.

22 **SPECIAL MASTER:** Okay. Now, in respect
23 of the original interrogatories, one of the questions
24 that I had as I was going through all of this was:
25 Have the answers been provided?

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1 And Mr. Farrell's January 5th e-mail
2 answers answered that for me. And I printed out the
3 marked up versions that Mr. Farrell was kind enough
4 to provide me. And I printed them out in color
5 because I wanted to see what the differences were in
6 a stark way.

7 And I will tell you that my conclusion
8 was that all of the changes that were made were
9 non-substantive. They were changing from active
10 voice to passive voice or vice versa. It was an
11 exercise in grammar and not an exercise in responding
12 to interrogatories.

13 So I will tell you that in respect of
14 the answers to interrogatories that were provided and
15 the amended answers to interrogatories that were
16 provided, they are both deficient in my view.

17 And I'm going to ask you to go back and
18 take a hard look. And the only thing that's being
19 pressed in respect of the first set of
20 interrogatories is interrogatory number 1. Okay.
21 I want you to go back, take a real hard look at
22 interrogatory number 1 from the first set of
23 interrogatories, which is the damages calculation. I
24 think that's correct.

25 **MR. ROTH:** It's the second set, your

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1 Honor.

2 **SPECIAL MASTER:** Oh, that's the second
3 set. Let me make sure that I've got --

4 **MR. FARRELL:** In the first set of
5 interrogatories, there were three or four of them.
6 It was number 1 on the identity of individuals.

7 **SPECIAL MASTER:** I'm sorry. We got
8 this -- you put the second set first in your
9 submission. Now why do you have to do that to me?

10 **MR. ASSAF:** That was a debate actually.

11 **MR. FARRELL:** Because we --

12 **SPECIAL MASTER:** Whoever said put the
13 second set first lost. Don't tell me who it was.

14 **MR. FARRELL:** We thought the first set
15 was going to be resolved by agreement is part of the
16 reason.

17 But as to the first set, the ones that
18 were the problems were number 1 with regard to
19 identifying individuals.

20 **SPECIAL MASTER:** I have it in front of
21 me. Just give me the numbers.

22 **MR. FARRELL:** Okay. Number 1, number 4,
23 number 12, and number 13.

24 **SPECIAL MASTER:** Number 1, 4, okay.
25 Let's deal with number 1. I mean, that's an

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1 incredibly -- do you have those, Mr. Roth?

2 **MR. ROTH:** I do, your Honor.

3 **SPECIAL MASTER:** Okay. Number 1 is
4 about as typical an interrogatory as they come.

5 Do the best you can. I understand
6 you're dealing with lay people who were not involved
7 in it in the first place. You know, just do the
8 best you can.

9 **MR. ROTH:** So just generally, your
10 Honor, and I'm happy to go through these with you,
11 but let's be clear what we're dealing with.

12 Because of the success of the fraudulent
13 scheme that we allege in the second amended
14 complaint, the people with direct knowledge who were
15 directly involved in decision making are dead in
16 these cases. We've said that in these responses,
17 that I don't have personal information.

18 **SPECIAL MASTER:** Okay.

19 **MR. ROTH:** And so I was listening to
20 your comment about what response I would want if I
21 propounded interrogatories.

22 I've told defense counsel what they
23 already presumably know, that the representative
24 plaintiffs were not directly involved in the decision
25 making regarding their case and provided them with

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1 the information and documents upon which counsel
2 would have relied.

3 They don't have direct information. And
4 so it is upon information and belief.

5 And in response to interrogatory number
6 1, it is her counsel, which is Mr. Bevan in this
7 case, and people identified in the Rule 26
8 disclosure, which would have been other lawyers.

9 But I cannot create an answer and
10 provide answers to information that plaintiffs here,
11 who sometimes are not a surviving spouse but are a
12 child or in the case of the substituted -- the people
13 who we are going to substitute, are even further down
14 the line, do not have that information.

15 And we were clear in our responses that
16 I don't have personal information. I was not
17 involved in the decision making pertaining to my
18 husband's case. That's the response from Miss
19 Chernick.

20 But in an effort to provide defendants
21 with some of the information that we could, that as
22 lawyers have, because they're going to be verified by
23 a client and it's not direct, upon information and
24 belief here are the documents that were relied upon.

25 So I understand that you want us to take

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1 a look at these and that your view was that these are
2 sub -- not responsive. And I want to push back on
3 that a bit, your Honor, and I'm happy to look at
4 these.

5 But I will tell you that these women,
6 because of the passage of time of a family that was
7 told you have no claim against us, or if you do, it's
8 worth nothing because there is no asbestos in our
9 talc, are justifiably saying I don't know, because I
10 didn't make those decisions. I don't know who the
11 witnesses were. I was a child.

12 And they're going to have a chance to
13 depose Mr. Bevan or other counsel.

14 But we were very clear in those
15 responses.

16 **SPECIAL MASTER:** Here's the problem,
17 okay. And, you know, discovery doesn't exist in a
18 vacuum. Discovery exists for purposes of defining
19 proofs at trial.

20 **MR. ROTH:** Yes, your Honor.

21 **SPECIAL MASTER:** What are you going to
22 do at trial, produce a plaintiff that says I don't
23 know?

24 **MR. ROTH:** Yes.

25 **MR. PLACITELLA:** Yeah. And they're

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1 going to say I don't know because I was defrauded.

2 **MR. ROTH:** And we're going to have their
3 family's lawyer testify and describe what happened.

4 **SPECIAL MASTER:** I was defrauded and no
5 one spoke to me? No one made any reference to me?
6 Nobody made any representations to me? How were you
7 defrauded when nobody made any misrepresentation to
8 you?

9 **MR. ROTH:** These are the representatives
10 of the decedents' estates that we're talking about
11 here.

12 **SPECIAL MASTER:** Bingo.

13 **MR. ROTH:** That's right.

14 **SPECIAL MASTER:** And they as
15 representatives don't get it both ways. They don't
16 get to say: I know nothing, but I can make the
17 claim.

18 They as representatives are obliged, as
19 far as I am concerned, to do as much as they can to
20 act in the stead of the decedent.

21 And if that means that they have to
22 search a little bit further and they have to make
23 additional inquiries, that's their job. But they
24 don't get to sit there and say: I'm like Sergeant
25 Schultz, I know nothing, and yet still present a

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1 claim.

2 **MR. ROTH:** And with respect, your Honor,
3 that's not what they said here. And they get to rely
4 on their lawyers, which is us who are doing the
5 investigation, and their lawyers who informed their
6 family.

7 And in that regard, it's no different
8 than a wrongful death case where the representative
9 can't testify about what a physician or a product
10 manufacturer warned their decedent about, but they
11 have the right to go forward despite their not having
12 that same firsthand knowledge. And here --

13 **SPECIAL MASTER:** But they have the
14 obligation to produce something more than just I
15 don't know, because then they don't make out their
16 case.

17 **MR. ROTH:** And so they went beyond
18 saying I don't have personal knowledge, your Honor.

19 But in these responses we've said upon
20 information and belief, here's what was done to
21 prosecute the case against Engelhard, and here's what
22 I understand was the basis for that decision.

23 Don't forget, these are interrogatories
24 addressed to individuals who are being -- you know,
25 they're asked to verify those. So they cannot say

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1 I've learned this, nor are they as individuals
2 expected to do the investigation. That's what
3 they've hired lawyers like us for.

4 And so in responding to the
5 interrogatories, where we've gone beyond just
6 claiming a general objection or an attorney/client
7 privilege, forget for a moment that -- and we've had
8 this discussion, I'm not retreading over it, our
9 disagreement about what causation means in this case.
10 Right. Did it cause the underlying case or did the
11 alleged lie cause them to make decisions?

12 We've gone further in the answers to
13 interrogatories to say upon information and belief,
14 here are the litany of documents, here's the
15 correspondence that our counsel relied upon that they
16 would have reviewed with our family.

17 But they cannot say I know this is what
18 happened when they didn't know what happened.
19 That's the tension here where we -- because of what
20 happened when these cases existed, the original
21 plaintiffs do not exist.

22 **MR. FARRELL:** Your Honor, frankly, I
23 think that the information and belief formulation
24 that Mr. Roth is just describing is even worse than
25 just getting a response that says I don't know,

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1 because then you enter the scenario that we had in
2 the two plaintiffs who were deposed last year, which
3 is that they say I don't know, but I know that the
4 complaint says X, Y, and Z, and I know something
5 really bad happened here supposedly.

6 And there's no way for the defendants to
7 test those facts because you're dealing with somebody
8 who is essentially just spouting hearsay from a
9 complaint instead of factual information within their
10 possession, custody, or control.

11 **SPECIAL MASTER:** Well, except that by
12 testifying that way, they're bound to it at trial.
13 They can't come up with something else at trial.

14 So when they take the stand, I assume
15 that you or some other equally fine lawyer at
16 Kirkland is going to say, as soon as the witness is
17 tendered, you're going to say: Your Honor, may I
18 voir dire the witness on competence? Competence.

19 And if they're not competent to testify
20 because they either had no perception, had no memory
21 of the perception, or had no ability to communicate
22 the memory of the perception, they're not competent.
23 So I don't know, but I assume because a complaint was
24 filed something awful happened.

25 **MR. FARRELL:** I completely agree.

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1 **SPECIAL MASTER:** Okay. So that's not a
2 bad answer for you.

3 **MR. FARRELL:** So then there's a second
4 category of information, however, and I'm glad that
5 Mr. Roth cited Mr. Bevan as an example of somebody
6 who would know.

7 Why is Mr. Bevan's name not in the
8 response?

9 **SPECIAL MASTER:** Okay. Well --

10 **MR. FARRELL:** Why is -- Mr. Bevan is
11 communicating with a lawyer on the other side.

12 **SPECIAL MASTER:** Well, Mr. Bevan's name
13 is not in the response, because if they put him in
14 there, that's a waiver of the attorney/client
15 privilege.

16 **MR. ASSAF:** But you've already
17 determined there's a full waiver.

18 **SPECIAL MASTER:** Well, I didn't
19 determine that.

20 **MR. ASSAF:** Chief Judge Linares did.

21 **SPECIAL MASTER:** Chief Judge Linares
22 did. Okay.

23 **MR. FARRELL:** I think that deals with
24 number 1. The next one --

25 **SPECIAL MASTER:** Number 4.

1 **MR. FARRELL:** -- was number 4. This
2 addressed -- and again, we're speaking about the six
3 class representatives here. Identify all of your
4 claims and dispositions, meaning all of your
5 settlements, and provide information about them.

6 **SPECIAL MASTER:** Okay.

7 **MR. FARRELL:** No response has been -- no
8 factual response has been provided to this, even
9 though your Honor has in fact already ordered
10 documents related to this to be produced.

11 **SPECIAL MASTER:** Except for the amount.

12 **MR. FARRELL:** That was for putative
13 class members, not for the class representatives.

14 **MR. ASSAF:** The class reps will get the
15 most.

16 **SPECIAL MASTER:** Well, do you?

17 **MR. ASSAF:** I think so. I think
18 we're --

19 **MR. FARRELL:** From the October 26th
20 hearing --

21 **SPECIAL MASTER:** Did I say -- I said
22 back then that you'd get the amounts for the class
23 reps?

24 **MR. FARRELL:** Your Honor drew a
25 distinction for the six class representatives and

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1 said for them everything goes.

2 You did draw a distinction based on the
3 30 Bevan select people. And then for other
4 putative --

5 **SPECIAL MASTER:** The Rothenberg numbers.

6 **MR. FARRELL:** Correct. But for the six
7 class reps we were to get everything with respect to
8 documents.

9 The interrogatory is essentially the
10 corollary of the document request. We haven't gotten
11 the information.

12 **SPECIAL MASTER:** Okay. What's the next
13 one?

14 **MR. FARRELL:** Number 12. And I should
15 explain. For one of the plaintiffs I think the
16 numbering is slightly different because they had one
17 fewer interrogatory. But I'll explain that number 12
18 is the interrogatory that asks for them to describe
19 the process behind decedent's decision to settle with
20 or dismiss Engelhard, obviously a key issue in the
21 case since that's the whole crux of the allegation.
22 There's been no change -- no substantive change to
23 this response.

24 After Chief Judge Linares' ruling that
25 the privilege had been waived and that the scope of

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1 discovery arguments had been rejected, we presume
2 information had been withheld on privilege and other
3 grounds. Nothing more has come.

4 The other thing I would note is we see
5 again the continued references to the second amended
6 complaint and to information in the possession of
7 former counsel.

8 That information is within the
9 possession, custody, or control of these six
10 individuals and needs to be provided. There needs
11 to be some explanation that says: I, Kimberlee
12 Williams, don't know the answer to this, but Tom
13 Bevan does, and here's the information he has.

14 **SPECIAL MASTER:** Okay. And that was
15 it?

16 **MR. FARRELL:** And 13 is the last one.

17 **SPECIAL MASTER:** Okay.

18 **MR. FARRELL:** Again, similar to number
19 12, all efforts made by decedent or her counsel in
20 the underlying case to develop and prosecute these
21 claims.

22 Mr. Placitella was just telling us this
23 morning about all of this discovery that's supposedly
24 happened in these cases. My understanding is a bit
25 different. But if that's the case --

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1 **SPECIAL MASTER:** That's what makes
2 lawsuits.

3 **MR. FARRELL:** -- it needs to be
4 described in this answer, again, not by saying the
5 second amended complaint says X, Y, and Z, but saying
6 I may not personally know, but Tom Bevan or somebody
7 else does and here's the information they have.

8 **SPECIAL MASTER:** Okay.

9 **MR. ASSAF:** May I have 30 seconds, your
10 Honor?

11 **SPECIAL MASTER:** Tick-tock.

12 **MR. ASSAF:** Okay. Number 11 slash 12 on
13 the reasons to settle, that's where the rubber hits
14 the road.

15 And going back to the old school
16 approach of people like Irving Younger, my big
17 beef --

18 **SPECIAL MASTER:** Are you calling me old
19 school?

20 **MR. ASSAF:** My concern --

21 **SPECIAL MASTER:** Notice, he's finessing
22 that answer.

23 **MR. ASSAF:** My concern is that when you
24 put forward an objection that says I object on
25 attorney/client privilege grounds, and then that

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1 objection is overruled, presumably when they put it
2 forward, they had to have some basis to say I'm
3 withholding information on attorney/client privilege.
4 Because otherwise --

5 **SPECIAL MASTER:** Not necessarily. It
6 could very well be that their view was if this
7 information exists, it would be within the four
8 corners of what my attorney has and therefore it's
9 privileged.

10 You know, you've done that, I've done
11 that, everybody's done that.

12 **MR. ASSAF:** But on this issue which was
13 so central to the debate over the last year, that's
14 the thing -- once the Bevan waiver is found by Chief
15 Judge Linares, it's hard to think what -- why isn't
16 that answer amended, because Bevan clearly knows
17 things that he could talk about to the people.

18 Again, that's their decision. Or they
19 could say I'm not doing it.

20 **SPECIAL MASTER:** Okay. That was 32
21 seconds.

22 **MR. ROTH:** So I'm looking at two
23 pages -- two and a half pages of blue print in
24 response to interrogatory 12.

25 **SPECIAL MASTER:** Of whose, whose

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1 responses?

2 **MR. ROTH:** I'm getting there.

3 **MR. FARRELL:** In the Kimberlee Williams
4 example that we submitted to the Court --

5 **SPECIAL MASTER:** Let Mr. Roth speak.

6 **MR. FARRELL:** It would be number 13.

7 **SPECIAL MASTER:** Well, whatever Mr. Roth
8 is looking I want to look at.

9 **MR. ROTH:** So I'm looking at Ware, which
10 is number 12.

11 **SPECIAL MASTER:** Who are you looking at?

12 **MR. ROTH:** Ware, the supplemental
13 responses.

14 **SPECIAL MASTER:** Donna Ware. Okay.
15 That I have. And you want me to look at which?

16 **MR. ROTH:** I'm looking at response
17 number 12. It begins on page 9.

18 **SPECIAL MASTER:** Okay.

19 **MR. ROTH:** Miss Ware said she was not
20 generally involved -- she was not involved in the
21 decision making with respect to Ralph's case. That's
22 her husband. My understanding of what happened
23 comes from the second amended complaint. Okay.

24 But we'll deal with all these issues.

25 **SPECIAL MASTER:** And the privileged

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1 communications with my attorneys --

2 **MR. ROTH:** Correct.

3 **SPECIAL MASTER:** -- which Chief Judge
4 Linares has said have been waived.

5 **MR. ROTH:** Well, I think that's us.
6 And I don't know that our conversations have been
7 waived, your Honor.

8 **SPECIAL MASTER:** Well, how do we know
9 that? How do we know it's with you and not somebody
10 else?

11 **MR. ROTH:** Well, I know the guy who
12 wrote them, your Honor. But that's fair.

13 **SPECIAL MASTER:** Okay.

14 **MR. ROTH:** And then it goes on to list
15 the documents and information that her lawyer would
16 have relied upon.

17 So with respect to the notion that these
18 responses were not amended, it's just not true.

19 With respect to the notion that we've
20 not provided information regarding these issues in
21 the interrogatory answers, that's not so. There's a
22 similar answer for each of these defendants from Miss
23 Williams' interrogatories. For Miss Williams it's
24 number 13.

25 **MR. FARRELL:** We're talking about two

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1 different interrogatories, your Honor. That's what
2 the disconnect is. The interrogatory that Mr. Roth
3 is currently discussing, and so the record is clear,
4 we're talking about plaintiff Ware, and for plaintiff
5 Ware we're talking about interrogatory number 12.
6 That actually corresponds to interrogatory 13 for
7 Miss Williams. And I apologize for the confusion,
8 but they're the same. It is the interrogatory --

9 **SPECIAL MASTER:** That's all right.

10 **MR. FARRELL:** It is the interrogatory
11 for Miss Ware, number 12, which asks them to explain
12 all efforts made to develop and prosecute claims.

13 When I said no substantive change had
14 been made, I was talking about the previous
15 interrogatory regarding the process of settling the
16 claim.

17 Now, the point that Mr. Roth just raised
18 is actually a separate issue and an additional
19 deficiency, which is that interrogatory number 12 for
20 plaintiff Ware asks the plaintiff to describe all
21 efforts made to develop and prosecute claims.

22 And instead of getting an explanation of
23 the steps they took to develop and prosecute claims
24 against Engelhard, we got a two page long list of
25 correspondence received from Engelhard's counsel,

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1 which is not responsive to the interrogatory.

2 **MR. ROTH:** Well, again, if you look at
3 page 10, while I have no firsthand knowledge, upon
4 information and belief records --

5 **SPECIAL MASTER:** Page 10 of whose?

6 **MR. ROTH:** I'm sorry, of the Ware
7 interrogatory.

8 **SPECIAL MASTER:** Of the Ware -- okay.
9 Because I got a pile of them here.

10 **MR. ROTH:** Yes, your Honor.

11 **SPECIAL MASTER:** You got to work with
12 me. All right. And of course -- page 10, I'm
13 looking at it.

14 **MR. ROTH:** Right. The first full
15 paragraph which is in blue, which means it was
16 amended after the -- describes: While I have no
17 firsthand knowledge, upon information and belief,
18 records and information obtained by my attorneys
19 indicate that when prosecuting Ralph's case, the
20 Bevan law firm was able to document sales of Amtal
21 talc to the Goodyear aerospace facility where Ralph
22 worked, and that the lawyers were also aware from
23 testimony of witnesses in the facility that
24 whitish/gray talc was used by employees in Goodyear's
25 plant. However, upon receiving Engelhard/Cahill's

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1 representations and information that the talc did not
2 contain asbestos, this was not specifically explored
3 in every case. It is also my understanding that
4 Ralph's lawyers retained experts in support -- to
5 support his lawsuit.

6 And that's a response to what was done
7 to prosecute the claim, your Honor.

8 And if with respect to the written
9 communications about why the case was settled that
10 piece should be in interrogatory -- or one of these
11 is in the wrong response, I'm sorry if one of these
12 is responsive to the wrong interrogatory number,
13 shame on me.

14 But the information has been -- you
15 know, the prosecution is acknowledged.

16 **SPECIAL MASTER:** Well, in respect of
17 Miss Ware, it should be 11 and 12 instead of 12 and
18 13.

19 **MR. ROTH:** Right.

20 **MR. FARRELL:** Correct, your Honor.

21 **SPECIAL MASTER:** Finally figured that
22 out.

23 **MR. FARRELL:** There's just a bit of
24 apples and oranges going on, your Honor. The
25 paragraph Mr. Roth just talked about suffers from the

1 problem related to upon information and belief and
2 information in my attorney's knowledge.

3 **SPECIAL MASTER:** I understand your
4 concern. But we have to be a little practical about
5 this. Okay. And that is I don't know how they can
6 unscramble this omelette at this point.

7 You have decisions that were made by
8 someone who has been dead for some time now. We
9 don't know what they said or didn't say to the person
10 who's now their personal representative. The person
11 who's now their personal representative is filing
12 verified responses saying: I didn't know about this
13 stuff, but I've read A, B, and C, and if you really
14 want answers, you got to go to my decedent's lawyer
15 at the time who might be able to provide this
16 information for you.

17 And since it's already been determined
18 that whatever attorney/client privilege may have
19 existed between the decedent and his lawyer is now
20 waived based upon the allegations made in the
21 complaint, that information should be produced to
22 you.

23 I read these, the answers in respect of
24 interrogatory 12 and to a certain degree 13 as to
25 everybody except Miss Ware, who's 11 and 12, as in

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1 many respects a good faith effort to respond to the
2 interrogatory.

3 Is it as complete as I would like it to
4 be? Not necessarily so. But it is a good faith
5 effort and it gives you something to start with.

6 So I understand what you want. And I
7 understand why you want it. But the problem is I
8 don't know that they can give you what they don't
9 have.

10 **MR. FARRELL:** I appreciate what your
11 Honor is saying.

12 What we're trying to avoid is the swords
13 and shields issue. And you've heard Mr. Roth already
14 allude to Mr. Bevan and the fact that he will be a
15 witness for the plaintiffs in this case and in fact
16 is on plaintiffs' initial disclosures as a witness in
17 this case.

18 **SPECIAL MASTER:** Then subpoena him for
19 deposition.

20 **MR. FARRELL:** But we are also entitled,
21 your Honor, to serve an interrogatory on the
22 plaintiff and ask for information in their
23 possession, custody, or control so that we have the
24 written answer and the information before the
25 deposition that your Honor is alluding to. And

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1 that's the issue.

2 **SPECIAL MASTER:** Well, let me make
3 painfully clear that if Mr. Bevan has information,
4 that is information that is in the possession,
5 custody, or control of the plaintiffs.

6 **MR. ROTH:** Well, we have provided not
7 only the files of the six and the files of the 30
8 that your Honor directed us to, we also in the course
9 of doing that found -- and I don't know that he
10 called it any -- you know, there was a discussion
11 about the Rothenberg files and whether there's some
12 kind of central file about Amtal.

13 But Mr. Bevan did find a file that was
14 unrelated to any particular client, and we produced
15 that as well, of just general, you know,
16 correspondence, your Honor.

17 We have in fact made a -- I was mindful
18 of what your Honor said before about what kind of
19 response would I want.

20 I can't put words in my clients' mouths.
21 I know there's information. And we made an
22 investigation to provide a more fulsome response than
23 just I don't know, trying to be mindful of your
24 Honor's directives from other hearings that we've had
25 and our obligation under the rules and at the same

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1 time knowing that we're not dealing with the people
2 who have firsthand information.

3 **MR. FARRELL:** If this response contains
4 what Mr. Bevan knows, so be it. That's all we
5 wanted, to be clear.

6 **SPECIAL MASTER:** Okay.

7 **MR. PLACITELLA:** Well, take Mr. Bevan's
8 deposition.

9 **MR. ASSAF:** No.

10 **SPECIAL MASTER:** Well, no, no. They're
11 entitled to know that it is from Mr. Bevan, which it
12 doesn't say. Right? Did I misread it? It does not
13 say this is the information from Mr. Bevan.

14 **MR. ROTH:** Well, it does talk about
15 information that my counsel relied upon and what my
16 counsel did. And if you're --

17 **SPECIAL MASTER:** Which really --

18 **MR. ROTH:** Well, that's Mr. Bevan.

19 **SPECIAL MASTER:** Right. But I'm not
20 sure that that person can say, you know, whoever it
21 is, Ware or whatever, can say this is what my counsel
22 relied on.

23 **MR. ROTH:** Which is why the responses
24 say upon information and belief, your Honor, because
25 the plaintiff to whom the interrogatories are

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1 directed cannot say what Mr. Bevan said or relied
2 upon. And if you are saying that that's what has
3 to -- what the responses are, okay.

4 **MR. ASSAF:** But there's a difference
5 between information and belief and what I am being
6 told by my -- that's my -- my quarrel is I don't
7 want to show up at a Bevan deposition and just have
8 this vague language about information and belief.

9 I was much more aligned with the
10 question before that said I want to make sure that
11 this is -- they're saying I relied or I heard this
12 from Mr. Bevan who told me X, Y, and Z. That's what
13 I need for the deposition.

14 And I heard Mr. Roth just say in
15 response to your Honor's question that these answers
16 incorporate what Mr. Bevan knows.

17 **SPECIAL MASTER:** Why don't we do this.
18 Let's make it clear who the source of the information
19 is, because if BASF takes Mr. Bevan's deposition,
20 they ought to be able to tie him back to specific
21 representations made by the plaintiff as to what Mr.
22 Bevan said or didn't say, because if your client
23 says: Well, Mr. Bevan told me A, B, C, and D, and
24 Mr. Bevan under oath says: I said no such thing,
25 you're going to have a problem.

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1 **MR. ROTH:** Understood, your Honor. The
2 person to whom Mr. Bevan would have given advice in
3 these cases is dead.

4 **SPECIAL MASTER:** Is the decedent.

5 **MR. ROTH:** Right. So I got a little
6 problem with getting an answer that says: Here's
7 what Mr. Bevan told me.

8 Now, I'm not being glib, but --

9 **SPECIAL MASTER:** But you're going to do
10 the best you can.

11 **MR. ROTH:** I will do the best I can,
12 your Honor. But here's the thing. We've gone back
13 to provide information about how the decision was
14 made. The clients don't know.

15 I get you want something that says Mr.
16 Bevan did bah, bah, bah, bah, bah.

17 Clients verifying such a response are
18 not going to have firsthand knowledge of that. Just
19 so we're clear, that's going to come from a lawyer.

20 **SPECIAL MASTER:** Then just put that in
21 the verification.

22 **MR. ROTH:** Okay.

23 **SPECIAL MASTER:** That's the way I cure
24 that problem, you know, everything in here is to the
25 best of my personal knowledge, and to the extent it

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1 is not within my personal knowledge, it's within
2 information and belief.

3 **MR. ROTH:** Okay.

4 **SPECIAL MASTER:** Put that in every --
5 pretty much every verification just in case.

6 **MR. ROTH:** Which is what we've put in
7 the interrogatory answers, your Honor. But I
8 understand.

9 **SPECIAL MASTER:** I think the answer's --
10 it's got to be in the verification, because that's
11 what -- that's where your client is putting their
12 stake in the ground in respect of this.

13 **MR. ROTH:** Well, when they say it in the
14 interrogatory responses, they have also said to
15 whoever is reading it, right, upon information and
16 belief, here's what happened, because I don't -- and
17 they have said in those responses: I'm not the guy
18 with firsthand knowledge.

19 **SPECIAL MASTER:** Well, but if they say
20 it on information and belief, they have to have to
21 identify the source of that information and belief.

22 **MR. ASSAF:** Correct.

23 **SPECIAL MASTER:** And that's where I
24 think the disconnects lies.

25 **MR. ROTH:** Okay.

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1 **SPECIAL MASTER:** Now, you can do that in
2 the interrogatory answer or you can do that in your
3 verification.

4 But to the extent that I don't know it,
5 it's based on information and belief from information
6 provided to me by A, B, C, you can do it either way.
7 I don't care. Whatever's more comfortable to you.

8 But it goes to the basic underlying
9 obligation to respond to interrogatories.

10 Now, I will tell you that if I've
11 learned something in 40 years of practicing law is
12 that interrogatories are generally a huge waste of
13 time, because what you get are the lawyer's answers
14 and not the client's answers.

15 I'm a big believer in requests for
16 production of documents and in requests for
17 admissions. Interrogatories don't do it for me.

18 But it is a method of discovery you're
19 entitled to use. But they always give rise to these
20 kinds of discussions.

21 But be that as it may, I think you know
22 where I'm going with this. And I think everybody
23 knows that what I want folks to do in the overarching
24 purpose is let's try to get the information, as much
25 information transmitted from one side to the other as

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1 we possibly can with a minimum amount of fuss so that
2 we can address the important stuff.

3 I'm looking at my watch. It's 2:15.
4 We've been at this since 10:30 this morning. We
5 took a break because you guys needed to go through a
6 list that took more than the five minutes that I had
7 very optimistically allowed.

8 **MR. ROTH:** Well, part of that was a
9 technical problem, your Honor.

10 **SPECIAL MASTER:** Now you're blaming Mr.
11 Reiley, who is sitting here very quiet.

12 **MR. ROTH:** I wasn't going to name him.

13 **SPECIAL MASTER:** Well, but be that as it
14 may, you know, we need to -- you know, I hate
15 wasting you guys' time.

16 **MR. ASSAF:** And I generally agree with
17 you on interrogatories, your Honor.

18 Just to be clear though, Mr. Bevan's an
19 attorney, a very skilled and capable one. I don't
20 want to show up for his deposition and learn for the
21 first time what he was telling his clients as to the
22 reasons to settle. And I think I'm entitled to that
23 beforehand.

24 **MR. ROTH:** Well, I don't know that Mr.
25 Assaf having read the first set of responses is going

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1 to be particularly surprised by what Mr. Bevan says.

2 Our effort was to provide responsive
3 information so that he could take his deposition.

4 What I don't want, your Honor, and it
5 seems to happen every time, is we come back and do
6 make a good faith effort given the fact that these
7 are people who were not the original plaintiffs, and
8 I will be told again I've moved the ball down the
9 line or I've changed the rules or I've done some
10 other thing in response to the next set of discovery.

11 **SPECIAL MASTER:** Well, you just need to
12 stop being such a bad guy.

13 **MR. ROTH:** I never should have shaved
14 the beard, your Honor.

15 **SPECIAL MASTER:** The beard should have
16 stayed. What can I tell you?

17 Actually, on a serious note, I'm going
18 to ask everybody again, attacks on opposing counsel
19 don't work for me. They don't. They actually hurt
20 you when you make them. So let's try to -- I know
21 they're in your drafts because they're in my drafts
22 of everything that I write. But they're not in the
23 final product. Okay. Get it out of your system.
24 Exercise the demon and go on.

25 Every lawyer in this case is a very good

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1 lawyer who's trying the very best they can for their
2 clients. I assume that for everyone. And pointing
3 fingers at somebody's not going to change my view of
4 that. It's just not.

5 So when you have a problem that is a
6 lawyer problem, just tell me and I will address it.
7 We had one, which was the slew of the objections at a
8 deposition. I addressed it. I addressed it
9 hopefully without pointing fingers at anybody and
10 said it's just not going to happen again.

11 And I hope in my heart of hearts that it
12 never happens again.

13 But we need to focus on what this case
14 is about. There's more than enough here to occupy
15 everybody who's in this room. So let's try to stay
16 on that.

17 And on that note, in respect of BASF's
18 motion to compel answers to interrogatories, I'm
19 going to ask plaintiffs to please go back and look at
20 their responses, of the first set of interrogatories
21 to interrogatories 1, 4, 12, and 13, with the
22 exception of Miss Ware's, where it would be 1, 4, 11,
23 and 12, check your responses. Please re-respond to
24 them as best you can.

25 In respect of the responses due from

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1 plaintiff Wengerd, the instructions in respect of not
2 talking to her about substance until she gets
3 re-deposed, I'm surprised it hasn't happened yet, but
4 that you're to treat her as if she were on
5 cross-examination. That does not apply to getting
6 her to sign a verification. So submit them to her.
7 If she's willing to sign it, fine. If she's not
8 willing to sign it as you've prepared it, ask her to
9 mark it up and send it back to you. Just do not
10 discuss the substance with her.

11 You're looking at meet strangely.

12 **MR. ROTH:** I am happy to do that, your
13 Honor. I'm happy to do that.

14 **SPECIAL MASTER:** Okay. Thank you.

15 As to the second set of interrogatories,
16 I'm going to ask for responsive answers as to
17 interrogatory number 1.

18 I am not going to address interrogatory
19 number 4. Frankly, I think that's something we need
20 not spend any time on.

21 On interrogatories 2, 3, 5, 6, 7, and 8,
22 I'm going to ask you to respond to those and that the
23 response in respect of those be contemporaneous with
24 the filing of your class cert motion.

25 And as to the responses that are being

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1 requested, which is again 1, 4, 12, and 13 as to the
2 first set of interrogatories, save for Miss Ware,
3 who's 1, 4, 11, and 12, and interrogatory number 1 of
4 the second set, that those two be provided to counsel
5 for BASF by the 29th of this month.

6 Is there anything else on this
7 application that we need to address?

8 **MR. FARRELL:** There's only the brief
9 procedural issue that the two plaintiffs who
10 apparently are going to be substituted but have not
11 yet been substituted, it's frankly a function not
12 just of verification but also we're going to have
13 depositions commencing as early as early February,
14 and as we sit here today we don't apparently have two
15 plaintiffs to depose, so...

16 **SPECIAL MASTER:** Okay. When can you
17 file your substitution of parties?

18 **MR. ROTH:** There is an estate question
19 in Ohio, your Honor, the only thing that we were
20 waiting for.

21 **SPECIAL MASTER:** Is the estate question
22 being somebody being named as a representative?

23 **MR. ROTH:** That's right, your Honor,
24 somebody being substituted as a representative.

25 **MR. PLACITELLA:** And the surrogate

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1 signing off or something.

2 **SPECIAL MASTER:** Right. Has the
3 surrogate -- do they call them that in Ohio?

4 **MR. PLACITELLA:** I don't know the exact
5 issue, but it's an estate issue.

6 **SPECIAL MASTER:** Surrogate's a New
7 Jersey term, so --

8 **MR. COHEN:** It's the registrar of wills.

9 **MR. ROTH:** I believe it's the registrar
10 of wills.

11 **SPECIAL MASTER:** Okay.

12 **MR. ROTH:** And we're waiting for the
13 signing off of the new representatives of the estate
14 to substitute. It's not a function -- it's only a
15 function of --

16 **SPECIAL MASTER:** It's ministerial, isn't
17 it?

18 **MR. ROTH:** Yes, your Honor. We can't
19 control the registrar of wills.

20 **SPECIAL MASTER:** Right.

21 **MR. ROTH:** But we know who it's going to
22 be.

23 **SPECIAL MASTER:** But since you know who
24 it's going to be, do your substitution as soon as you
25 can.

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1 **MR. ROTH:** Yes, your honor.

2 **SPECIAL MASTER:** I wouldn't -- if it's
3 just going to be a ministerial act, I wouldn't wait
4 for that.

5 **MR. ROTH:** As long as there would be no
6 objection.

7 **SPECIAL MASTER:** Right. And if there's
8 a problem later on, we'll fix it.

9 **MR. ROTH:** Okay. Thank you, your Honor.

10 **SPECIAL MASTER:** I don't think anybody's
11 going to have any trouble with that.

12 Now, just so you know, your filings are
13 limited to what a large binder clip can grab, because
14 that's as far as my ability the understand goes. I
15 much prefer the smaller clips.

16 But before we go into that, can I please
17 remind everybody, please double-space everything. I
18 have enough trouble reading Times New Roman 12 point
19 than having to read it in single-space.

20 I don't know if you noticed, but I have
21 trifocals, and it gets really bad when I actually
22 have to take my glasses off to read it.

23 Single-spaced letters are nice, but
24 they're hard to read. So if you could do
25 double-space, please, that would be nice.

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1 **MR. COHEN:** Still want the 14 font?

2 **SPECIAL MASTER:** As long as it's
3 double-spaced --

4 **MR. COHEN:** 12 is okay?

5 **SPECIAL MASTER:** -- 14 -- yeah, 14 is
6 nice, but 12 I can live with. Either, you know, 14
7 proportional or 12 non-proportional. So I'm big fan
8 of Courier. It's easier to read for old people like
9 me.

10 Anyway that was the original one.

11 The last thing that I have is something
12 that has not been filed of record that was triggered
13 by Mr. Assaf's original e-mail saying that -- is it
14 today?

15 **MR. ASSAF:** Today.

16 **SPECIAL MASTER:** Today. Oh, big day
17 today.

18 That today BASF was going to be filing
19 their opposition to plaintiffs' motion to determine
20 the crime fraud exception and Kozlov exception to
21 defendant's assertions of attorney/client privilege.

22 In that e-mail Mr. Assaf noted that
23 there were two filings that they intended to make.
24 One was an unrestricted filing of an opposition brief
25 that they requested, if memory serves me, a 65 page

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1 limitation on it.

2 Mr. Ryan on behalf of the Cahill Gordon
3 defendants had asked for a 70 page.

4 Both of those applications were granted.
5 Just make sure they're a good 65 and 70 pages.

6 But in his e-mail Mr. Assaf further
7 advised that there was a separate submission he
8 intended to make, about 220 pages' worth, that he
9 intended to submit on an ex parte basis for review in
10 camera.

11 That triggered a letter dated January
12 the 12th, 2018, from Mr. Placitella objecting to the
13 filing of the ex parte and under seal submission,
14 stating first that a secret brief, I like that term,
15 that's really nice, secret brief is unnecessary and
16 that it would only become relevant if there's a
17 determination that plaintiffs have met the prima
18 facie threshold.

19 I would have said when the Court
20 determines that you've met it. But I'm a little more
21 forward than you are.

22 And that there should be a hearing for
23 the parties to be heard on the procedure and that in
24 any event you receive a copy of this brief.

25 Let me specifically go to my notes where

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1 I wrote that your letter provides that the secret
2 brief, I'm going to use that term because I like it,
3 not because it aptly describes it, but because it's
4 colorful, is not relevant, it is unnecessary, and it
5 violates plaintiffs' due process and fair trial
6 rights.

7 Mr. Placitella suggests that we consider
8 the state court's special discovery master's reports
9 and the state crime fraud evidentiary record, that
10 plaintiffs be provided with specific documents in the
11 ex parte submission, and that plaintiffs be allowed
12 to review and oppose BASF's submission or file their
13 own documents in rebuttal.

14 On January the 14th, which I will point
15 out once again was Sunday, January the 14th, during
16 playoff games, BASF filed its letter in opposition
17 that stated as follows. Number 1, that the Court
18 had already rejected the request to review the crime
19 fraud decisions in the Samson case, that the request
20 of the plaintiffs to review the ex parte submission
21 is inappropriate, that the request for BASF's
22 specific documents or a list thereof or be allowed to
23 submit their own document list in opposition has no
24 basis, and talked about the timing of the BASF ex
25 parte brief.

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1 By letter dated January 14, 2018,
2 reminding again it was a Sunday during -- I think
3 this one arrived just as the Vikings were scoring
4 their last touchdown, that Cahill Gordon opposes it,
5 they join in BASF's opposition, and said that they
6 would withhold filing their opposition due today
7 until they get additional guidance.

8 Let me just tell you sort of where I
9 come out on it because I think it would help
10 everybody.

11 Attorney/client privilege issues are
12 tricky to handle, because once the horse is out of
13 the barn, the horse is out of the barn. And so they
14 have to be dealt with, with a little bit of tact and
15 consideration for the issues that are at play.

16 As a result, the judiciary, both federal
17 and state, have developed pretty much a template on
18 how they are to be handled.

19 You have a party that asserts that
20 they're entitled to discovery for a certain reason,
21 an opposition that says no, they're not because it's
22 privileged for the following reasons.

23 And at some point or another somebody's
24 got to look at documents and say they are or they are
25 not privileged, number 1, and number 2, if they are

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1 privileged, does the privilege bar their disclosure.

2 So it's really a two-step process. And
3 the way that it is normally done, or at least in my
4 experience the way that it's normally done is that
5 somebody requests the discovery. The possessor of
6 the privileged document says: No, you can't have
7 them because they're privileged, and then submits at
8 the same time an ex parte submission for the decision
9 maker to decide, number 1, are they privileged in the
10 first instance, and if they are, has that privilege
11 been waived by either operation of law or by fact.

12 And the allegation here is that the
13 privilege has been waived because of the crime fraud
14 exception and/or the Kozlov considerations.

15 In those circumstances, the person
16 seeking the information doesn't get to see the
17 privileged documents because that kind of lets the
18 cat out of the bag.

19 There are other ways of handling it that
20 I've seen and actually done that get a lot more
21 complicated, and that is, for example in this
22 instance, plaintiffs retaining a special conflicts
23 counsel who is then allowed to look at the documents
24 but cannot report on them back to you. I mean,
25 that's one way of doing it. I don't know if that's

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1 what you want to do.

2 **MR. PLACITELLA:** So let me just try
3 to --

4 **MR. ASSAF:** I think you are that person.

5 **SPECIAL MASTER:** Well, I am the decider.

6 I'm not the advocate. Okay. But normally, whoever
7 the decision maker is tries to occupy both.

8 But if you've got a party who says
9 basically I really don't trust you to make the right
10 decision, we'd like to have a dog in that fight,
11 there are ways of organizing that in such a way where
12 it's insulated, whoever is performing the role
13 understands that they have what us old guys used to
14 call a Chinese wall, now is called a screening device
15 or mechanism that is not to be pierced. That's
16 another way of doing things.

17 **MR. ASSAF:** So my experience doing these
18 several times over -- more than I care to imagine
19 over 25 years, I haven't done the special master --

20 **SPECIAL MASTER:** You should stop getting
21 into these messes.

22 **MR. ASSAF:** Is pretty much aligned with
23 how you laid out it, that there's an in camera
24 process -- especially in federal court, there's an in
25 camera process and the judge or magistrate or special

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1 discovery master reviews it. And that I actually
2 think goes back to Chief Judge Linares' view in terms
3 of appointing you --

4 **SPECIAL MASTER:** Yes.

5 **MR. ASSAF:** -- and the characteristics
6 he was looking for. And I think it's even in his
7 order.

8 So I hesitate to add yet another person
9 to this as opposed to your Honor, who --

10 **SPECIAL MASTER:** I'm not recommending
11 it.

12 **MR. ASSAF:** Okay.

13 **SPECIAL MASTER:** I'm just saying if the
14 plaintiffs are really going to get crazed about it,
15 there's another way of providing another step of
16 comfort.

17 **MR. PLACITELLA:** That's not my issue.

18 **SPECIAL MASTER:** I don't think you need
19 it.

20 **MR. PLACITELLA:** That's not my issue.

21 **SPECIAL MASTER:** Okay.

22 **MR. PLACITELLA:** As I understand it,
23 just so we're on the same page, and maybe we're all
24 on the same page, we were to provide and submit our
25 crime fraud brief to make out a prima facie case.

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1 And in that brief we had to refer only to stuff that
2 was in the public record. Right?

3 **SPECIAL MASTER:** Well, because we're in
4 the bizarre set of circumstances --

5 **MR. PLACITELLA:** Yes.

6 **SPECIAL MASTER:** -- that in parallel
7 proceedings --

8 **MR. PLACITELLA:** Right.

9 **SPECIAL MASTER:** -- you've had access to
10 stuff that you haven't had access to in this case and
11 that I haven't had access to in this case.

12 **MR. PLACITELLA:** Yeah, I'm not -- and
13 the purpose --

14 **SPECIAL MASTER:** It's a unique set of
15 circumstances, we all agree.

16 **MR. PLACITELLA:** Right. And the purpose
17 of that submission and response was for you to
18 determine whether there was a prima facie case made
19 of crime fraud.

20 If there was -- if you find that there
21 is, then a couple of things -- a few things become in
22 play. One, at that point you get to review the
23 documents at issue in camera.

24 And I'm not looking to inject another
25 individual into the process.

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1 **SPECIAL MASTER:** Okay.

2 **MR. PLACITELLA:** Or you also have the
3 issue of, if we make out a prima facia case of a
4 crime fraud, do we get to take depositions of the
5 defendants under a 502(d) order to ask them certain
6 questions to fill it out? That's what I thought was
7 at issue. Now, because --

8 **SPECIAL MASTER:** Well, the only
9 thing that is at issue --

10 **MR. ASSAF:** That's never been an issue.

11 **SPECIAL MASTER:** The only thing that is
12 at issue right now based on your January 12th letter
13 is the submission of the ex parte provision --

14 **MR. PLACITELLA:** Yes.

15 **SPECIAL MASTER:** -- that Mr. Assaf
16 referred to, about 220 pages, which I assume is
17 pretty much all documents.

18 **MR. PLACITELLA:** Well, that's what I
19 want to address.

20 **SPECIAL MASTER:** Okay.

21 **MR. PLACITELLA:** If it's just documents,
22 that's one thing. If there is advocacy attached to
23 that submission, that's wrong. They shouldn't be
24 able to --

25 **SPECIAL MASTER:** Okay. Is it all

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1 documents or advocacy?

2 **MR. PLACITELLA:** Let me just -- if
3 there's advocacy attached to that submission, then we
4 need to participate. And frankly, I thought the
5 easier way to do it would be, if you find a prima
6 facie case, we'll identify for you the documents we
7 think you should look at. We don't think you need to
8 look at a thousand documents. You may only have to
9 look at 75 documents.

10 If they believe that there are another
11 10 documents that you should look at to round out the
12 picture, so be it.

13 But it shouldn't be that they give you a
14 220 page set of documents, many of which we don't
15 care about or are not challenging, and it shouldn't
16 be that they have a chance to advocate in absentia
17 that issue.

18 **SPECIAL MASTER:** You're saying that
19 because you're in the sort of odd position where
20 you've already gotten this discovery in a different
21 case --

22 **MR. PLACITELLA:** I know what the
23 documents say.

24 **SPECIAL MASTER:** Well --

25 **MR. ASSAF:** Some of them.

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1 **SPECIAL MASTER:** Okay.

2 **MR. PLACITELLA:** Well, if I don't
3 know what they all say, then that's a concern.

4 **SPECIAL MASTER:** You're not answering my
5 question. My question is do you know what the
6 documents -- have you seen the documents that you
7 want me to rule on?

8 **MR. PLACITELLA:** Yes.

9 **SPECIAL MASTER:** You have copies of
10 those?

11 **MR. PLACITELLA:** Not in the context of
12 this case.

13 **SPECIAL MASTER:** No, no. But you have
14 copies of those?

15 **MR. PLACITELLA:** Yes.

16 **SPECIAL MASTER:** Okay. And they are
17 subject to whatever the state court proceedings in
18 the Samson case have put in the way of restrictions?

19 **MR. PLACITELLA:** I'm not sure what I'm
20 allowed to say here or not say, so I want to be very
21 careful.

22 I didn't want to get to I read the
23 document, this is what it says. All I wanted to do
24 was go to the privilege log and say to you, I only
25 want you to -- I want you to look at the following

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1 documents on the privilege log, like I would do in
2 any other case, pretending as best I can that I don't
3 know anything.

4 **SPECIAL MASTER:** Okay.

5 **MR. ASSAF:** May I respond?

6 **SPECIAL MASTER:** That is a lot more
7 helpful than honestly I thought.

8 **MR. PLACITELLA:** Okay. My concern is
9 that they give you the documents they want you to
10 look at, they're not even the documents --

11 **SPECIAL MASTER:** That you're interested
12 in.

13 **MR. PLACITELLA:** -- that I care about
14 and it's attached to some piece of advocacy that I
15 can't rebut and I can't get the left side of my brain
16 away from my right side, knowing that if I knew what
17 documents they gave you, then I could kind of get a
18 sense of where things were going. It's an issue.

19 **SPECIAL MASTER:** Okay. Just so that I
20 understand, I understand that your motion for the
21 application of the crime fraud exception and/or the
22 Kozlov exceptions is going to be limited to a finite
23 number of documents that you already know which ones
24 they are?

25 **MR. PLACITELLA:** I'm assuming -- yes.

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1 Yes.

2 **SPECIAL MASTER:** Okay. What's wrong
3 with that procedure?

4 **MR. ASSAF:** So --

5 **MR. PLACITELLA:** And the ability if you
6 find crime fraud then to take -- you know, I have to
7 take the depositions at some point.

8 **SPECIAL MASTER:** Right. We'll jump off
9 that bridge when we get to it.

10 **MR. ASSAF:** Here's what wrong with that
11 procedure, your Honor. And you're going to see this
12 when you look even at our public brief tonight or
13 tomorrow now, that the well-established case law
14 within the Third Circuit and virtually every other
15 federal court I know of says when -- it's beyond
16 dispute when a challenging party moves to challenge
17 attorney/client privilege on crime fraud grounds, and
18 Mr. Placitella's partially right, they have an
19 obligation to identify the 20 to 40 documents on the
20 privilege log that they would like your Honor to do
21 so. Okay. Court after court --

22 **SPECIAL MASTER:** Just let me stop you
23 for one moment.

24 Did you do that --

25 **MR. ASSAF:** No.

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1 SPECIAL MASTER -- on your initial
2 submission?

3 MR. PLACITELLA: I didn't because I
4 didn't think that's what you wanted. I thought what
5 you wanted was how do we make a prima facie case of
6 crime fraud? And if you make that determination,
7 then we'll go to the step of me telling you what
8 documents to look at.

9 SPECIAL MASTER: Okay.

10 MR. ASSAF: But, your Honor, from the
11 very first time at the October 25th hearing that you
12 brought this up --

13 SPECIAL MASTER: 26th.

14 MR. ASSAF: 26th hearing that you
15 brought this up, you talked about the fact that we're
16 in the Third Circuit, the Third Circuit laws control.

17 And the Third Circuit is pretty clear.
18 You as a charging party has an obligation.

19 Now, Mr. Placitella's been at this a
20 long time. He failed -- there's an abject failure of
21 proof on that. So where are we? So --

22 SPECIAL MASTER: Which I assume is going
23 to be amply briefed in your submission.

24 MR. ASSAF: Correct. It will be in our
25 submission.

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1 But I also heard your Honor, including
2 today, say: Yeah, I think there's probably going to
3 be a prima facie case.

4 So I was going to submit everything,
5 because I thought you'd want to kick the tires.

6 **SPECIAL MASTER:** I hope I didn't say
7 that. I hope I never said I think there's going to
8 be a prima facie case, because I will tell you right
9 now, I try very hard not to prejudge anything.

10 **MR. ASSAF:** Fair enough, your Honor.

11 **SPECIAL MASTER:** And so for me what's
12 important is to give all of you the opportunity to
13 have your say. And I think today is more evidence
14 of that.

15 **MR. ASSAF:** Correct.

16 **SPECIAL MASTER:** You're going to get the
17 opportunity to have your say. And at some point I'm
18 going to decide, for no other reason than somebody's
19 got to decide something along the way.

20 **MR. ASSAF:** Agree completely.

21 **SPECIAL MASTER:** So putting that to the
22 side, we just heard from Mr. Placitella that what he
23 would like to have happen is you file your opposition
24 brief, he files his reply brief, I make a
25 determination on whether a prima facie case has been

1 made.

2 If I find that a prima facie case --
3 sorry. If I conclude that a prima facie case has
4 been made, then Mr. Placitella is going to give me a
5 finite number of documents that he -- and he's not
6 going to ask for anything else. He's going to give
7 me a finite number of documents, that he's going to
8 say: Since you found a prima facie case, please
9 determine these.

10 You're going to then respond: -- this
11 is what he's proposing. You're going to then
12 respond. And your response doesn't have to be
13 limited to those. You can say there are these other
14 privileged documents that he's not asking for that
15 give a different view of what that document is all
16 about. And if it's privileged, you're going to be
17 able to submit it ex parte.

18 And that's a risk that Mr. Placitella
19 runs, that you're going to be able to rebut with
20 something that he hasn't seen.

21 Although my guess is that by this point
22 in this case, pretty much everyone has seen a lot of
23 everything.

24 I'm going to tell you right up front the
25 proposal that I review, the special master's reports

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1 and those decisions, until somebody tells me that the
2 Supreme Court has lifted the stay, I don't want to
3 see any of that.

4 **MR. PLACITELLA:** I figured you would say
5 that.

6 **SPECIAL MASTER:** Until the Court lifts
7 the stay, I don't want to be there.

8 **MR. PLACITELLA:** I understand.

9 **SPECIAL MASTER:** Okay.

10 **MR. ASSAF:** So your Honor, my biggest
11 point is coming back to I'm going to live with
12 whatever the standard is with the Third Circuit. And
13 the Third Circuit standard says when he moves, he has
14 to identify the documents.

15 Now, he didn't do so, your Honor.
16 Okay. And we're now months down the road from when
17 he was supposed to. Okay. That's not how this
18 works. Okay. If we're going to play by the
19 rules --

20 **SPECIAL MASTER:** So you're going to put
21 it in your opposition. And he's going to put it in
22 his reply.

23 **MR. ASSAF:** But not with the document --
24 but not -- he can't -- in other words --

25 **SPECIAL MASTER:** If you want --

1 **MR. ASSAF:** -- the last three months
2 would have been much different for me.

3 **SPECIAL MASTER:** I'm sure that that is
4 the case.

5 **MR. ASSAF:** I can't on the eve of my
6 opposition, your Honor, find out that now he's going
7 to get to start over again.

8 **SPECIAL MASTER:** It's not the eve. It's
9 the day of your opposition.

10 **MR. ASSAF:** Correct. But, your Honor,
11 that's fundamentally unfair. He knows what the
12 standard is and he didn't do it. And now on Friday
13 night --

14 **SPECIAL MASTER:** But I can fix that. I
15 mean, I can fix that by giving you the opportunity to
16 file a sur-reply. So I can fix that. That's not
17 that big of a problem.

18 If that is the procedure that Mr.
19 Placitella follows and in his reply he identifies the
20 documents that he wants, then you can -- the whole
21 purpose of a reply is to fix problems that have been
22 brought up in an opposition.

23 And you want to be able to respond to
24 that. I'll give you leave to file a sur-reply,
25 which as those of you who have practiced before the

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1 District of New Jersey know, that's not granted
2 often.

3 But you're not going to be prejudiced.
4 I'm telling you that right now. It's not going to
5 happen.

6 **MR. ASSAF:** Well, your Honor, I kind of
7 feel like I am, so I'm sorry. But on Friday night I
8 get a piece from Mr. Placitella saying: Well, here's
9 what I want to do.

10 And then on Monday we come in here and
11 we argue it. And for the very first time he now
12 comes to grips with he failed to follow a Third
13 Circuit law. And I'm being told: Well, it's kind
14 of -- don't worry, you'll get another brief on it.
15 Okay.

16 I've strategized this with co-counsel,
17 with my client, and I'm being told now: Well, you'll
18 get another shot at it, when if anything, again, I
19 followed what the Third Circuit told me. And I
20 shouldn't have that changed.

21 Under the rights standard, with all due
22 respect, your Honor, I'm going to win this.

23 And so -- but I just want the rights
24 standard. I don't think Mr. Placitella should get to
25 change the procedure the day I file my brief.

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1 **SPECIAL MASTER:** Okay.

2 **MR. PLACITELLA:** It's my understanding
3 this is how you wanted to do it.

4 **MR. ASSAF:** Under what case?

5 **SPECIAL MASTER:** Well, I don't --

6 **MR. PLACITELLA:** I could have been
7 wrong.

8 **SPECIAL MASTER:** I don't know where you
9 got that from.

10 But be that as it may, Mr. Ryan, who's
11 been here all day long listening to us go on and on
12 and on, what have you to add?

13 **MR. RYAN:** On behalf of the Cahill
14 defendants, your Honor, I think that we're maybe
15 over-thinking this issue a little bit.

16 I appreciate that Mr. Placitella was
17 involved in the Samson matter, but we all need to
18 remember that Cahill was not a party in the Samson
19 matter.

20 The reality of life is that Mr. Assaf is
21 correct, that there's a well set of established law
22 in the Third Circuit with regard to how this process
23 is supposed to play out. Mr. Placitella files his
24 motion, the defendants get to file a reply, and your
25 Honor gets to decide the issue before we even get to

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1 in camera. So that's my concern.

2 And as counsel for Cahill, obviously we
3 have other issues because we have to respect the
4 privilege.

5 **SPECIAL MASTER:** Well, work this out
6 with me, Mr. Ryan, if you would. The objection that
7 is being interposed right now is a purely procedural
8 one. It's one that says this is the process that
9 should have been followed, it was not followed, and
10 therefore the application should be denied.

11 What if the procedural problem is cured?
12 Am I to ignore that and simply decide on the
13 procedural issue? Or should I say the procedural
14 issue can give way to a determination of the
15 substance, particularly in a case like this where the
16 substance is pretty serious.

17 I say that only because that's what's
18 being alleged. I'm not making a determination one
19 way or the other that that's the end result.

20 And the fact that I'm here and doing
21 this, you know, it's not the typical case that gets a
22 special master assigned. And it's not the typical
23 case that gets somebody like me appointed as special
24 master.

25 **MR. ASSAF:** Correct.

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1 **SPECIAL MASTER:** Because there are
2 important considerations that are at play here that
3 are important to everybody. And they are
4 considerations that go to the heart of what we do as
5 lawyers.

6 And I've said it before and I will say
7 it again. I have nothing but the utmost respect for
8 our profession. I jokingly say that if you want
9 proof of that is the fact that I married a lawyer and
10 38 years later we'll still married. So it is
11 something that is very near and dear to my heart.

12 The allegations in this case, I think if
13 anybody looks at them objectively, they are
14 troubling, but they're just allegations.

15 So I have to make sure that everybody in
16 this room and everybody, you know, on the telephone
17 gets a fair shake in this case.

18 And under those circumstances, don't you
19 think I absolutely have to?

20 **MR. RYAN:** Respectfully, I don't, and
21 it's for this reason, your Honor. One, this case has
22 been bubbling around for six or seven years. Mr.
23 Placitella and his firm are fine lawyers.

24 By the pure magnitude of the motion that
25 was filed, you can tell it was well researched, well

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1 thought out. If it's fatally flawed, I don't think
2 you get to do a do-over.

3 I think Mr. Assaf and his clients are
4 here today apparently ready to file their brief
5 today. And I don't think it's fair to say, okay,
6 well, there's a, you know, a little procedural
7 misstep here and we're going to flip out the process
8 that the Third Circuit has used, flip out the process
9 that New Jersey has used, and we're going to add
10 another step. After BASF and Cahill submit their
11 briefs, now plaintiff can backfill and fix a fatal
12 flaw in their submission.

13 This isn't the case I think, candidly,
14 Judge, where you have a minor procedural misstep that
15 your Honor with his equity powers can fix and bring
16 us all back. This one isn't like that.

17 We've all been litigating this
18 particular case way too long. The issue is teed up.

19 And I think your Honor should candidly
20 follow the procedure that the courts have set,
21 because I think when you do, you're going to find
22 there was no prima facie case.

23 **SPECIAL MASTER:** I don't disagree with
24 you, Mr. Ryan.

25 But when I look at it, there are to

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1 me -- and I think I've mentioned this before, there
2 are two other than that, Mrs. Lincoln, how did you
3 like the play issues in this case. One is this
4 motion. The second one is class cert.

5 I think either of those -- the
6 determination in respect of either of those will have
7 a fundamental effect on this case and how it goes
8 forward.

9 I'm just being very candid with you that
10 I am a little troubled, at least at the first
11 instance, with deciding a motion of such gravity
12 solely on a procedural shortcoming.

13 But if I understood your response
14 yesterday, Mr. Assaf, it was: Listen, the only time
15 you're going to need to reach my ex parte brief is if
16 you find that a prima facie case has been made.

17 So I'm going to ask you -- and I think
18 I've paraphrased exactly what you said.

19 So I'm going to ask you to do me this
20 favor. File your public brief. Hold the other one
21 in abeyance until there's a determination on whether
22 a prima facie case has been made.

23 And then we can go from there, unless
24 you need it as part of your opposition to the prima
25 facie case, which is not what you told me in your

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1 letter.

2 **MR. ASSAF:** I'm sorry, say that again,
3 your Honor.

4 **SPECIAL MASTER:** Well, unless you need
5 your 220 page ex parte brief to argue --

6 **MR. ASSAF:** Oh, yeah. Okay. I hear
7 you.

8 **SPECIAL MASTER:** Unless you need that,
9 but that's not what you told me. But unless you need
10 that, I would ask you to just hold off on it, let me
11 make a determination on the prima facie case first,
12 and then we'll see where that takes us.

13 **MR. ASSAF:** So a couple reactions, your
14 Honor. First of all, I want to be clear, I know
15 we've been talking about a procedural issue. I think
16 it's more than procedural, just to be fair, and it's
17 going to be raised in our brief.

18 There are substantive deficiencies, as
19 your Honor I think pointed out in the first hearing.
20 Okay. Law's well settled that they have to make a
21 prima facie in showing activity in furtherance of a
22 crime or a fraud.

23 So it's not just procedural of
24 identifying the documents. It has to be then the
25 substantive arguments in furtherance of. Okay.

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1 And again, it's not -- since the brief
2 is done I'll tell you. Mr. Placitella doesn't want
3 to engage on the in furtherance of. He's trying to
4 say, well, it could be a different standard, it might
5 be a different standard.

6 And there are reasons for that. I think
7 your Honor will figure it out. Doesn't like the
8 standard. Okay. But the Third Circuit does.

9 **SPECIAL MASTER:** I'll do my best.

10 **MR. ASSAF:** But the Third Circuit does
11 like the standard.

12 So now, in terms of then the public
13 brief and the prima facie case, again, your Honor, I
14 think I just -- I'd like to have a break of about
15 five minutes to talk to Mr. Farrell about it and get
16 back to you.

17 **SPECIAL MASTER:** Sure. You may want to
18 talk to Mr. Ryan also.

19 **MR. ASSAF:** And Mr. Ryan as well.

20 **SPECIAL MASTER:** He seems to be in your
21 camp.

22 **MR. ASSAF:** But I'm just trying to --

23 **SPECIAL MASTER:** Unless, Mr. Ryan, you
24 don't want to talk to these guys, which I wouldn't
25 blame you.

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1 **MR. ASSAF:** So I'm just to trying to
2 figure out then what the process would be, that we
3 would file our public brief and Mr. Placitella would
4 file a reply as to why he thinks either the standard
5 isn't in furtherance of or why he didn't have to
6 review -- identify the documents as opposed to start
7 over.

8 **SPECIAL MASTER:** If he files a reply
9 that goes outside the four corners of your
10 opposition, you will get the right to file a
11 sur-reply. How's that?

12 **MR. ASSAF:** Okay. Let me talk to Mr.
13 Farrell about that, if that's okay.

14 **SPECIAL MASTER:** Talk to Mr. Farrell.

15 **MR. ASSAF:** And Mr. Ryan.

16 **SPECIAL MASTER:** Okay. Let's take a
17 couple minute break.

18 (Break.)

19 **SPECIAL MASTER:** Mr. Placitella?

20 **MR. PLACITELLA:** So maybe there's a
21 different way to approach this that works for
22 everybody.

23 It was truly our understanding that we
24 were to approach it the way we did. And out of the
25 abundance of caution and great concern not to tread

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1 on the sealing orders in Samson, maybe we went
2 overboard and did not even mention a document under
3 seal, only information that was outside -- you know,
4 on the record.

5 **SPECIAL MASTER:** That's your reply,
6 isn't it?

7 **MR. PLACITELLA:** Right. Well, but there
8 might be an easier way to shortcut all this.

9 **SPECIAL MASTER:** Okay.

10 **MR. PLACITELLA:** And the simple way I
11 think to handle it is give us three days. We'll give
12 them the list of documents before they make their
13 submission. And then they can make -- you know, give
14 them some extra time to make their submission. And
15 they can make their submission. And then we don't
16 have to, you know, do the extra dance, because we can
17 do it very quickly, if that's what the Court wants.

18 **SPECIAL MASTER:** Mr. Assaf, you want to
19 think about that for a moment or just reject it out
20 of hand?

21 **MR. ASSAF:** Well, I think I'm going to
22 reject it out of hand because -- so, you know, I
23 think what you're hearing -- again, now I will put my
24 advocacy hat on.

25 I think Mr. Placitella realizes he's in

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1 a boatload of trouble under Haines and Liggett in the
2 Third Circuit and that by failing to identify -- he's
3 familiar with the California cases that have ruled on
4 this very issue.

5 So we will submit our brief. I think,
6 your Honor, we've heard about what you said.

7 I've now been looking at e-mails. Mr.
8 Placitella's brief is pretty clear that they think it
9 was just a broad, you know, you get to examine all
10 communications.

11 **SPECIAL MASTER:** Don't tell me what your
12 brief is going to say that hasn't yet been filed.

13 **MR. ASSAF:** So in terms -- we'll see
14 what Mr. Placitella's reply says. And then we'll
15 take up your sur-reply, your Honor. But to be
16 clear --

17 **SPECIAL MASTER:** You're going to look at
18 his reply and you're going to let me know whether you
19 want to file --

20 **MR. ASSAF:** Correct.

21 **SPECIAL MASTER:** -- more importantly,
22 whether you need to file --

23 **MR. ASSAF:** Correct.

24 **SPECIAL MASTER:** -- a sur-reply. And I'll
25 deal with it.

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1 I'll tell you right now, if the reply
2 goes outside the four corners of the opposition,
3 you're going to have time to file a sur-reply.

4 **MR. ASSAF:** And then, your Honor, I
5 didn't answer a question that you posed to me before
6 and I want to answer it because I don't want to --

7 **SPECIAL MASTER:** That's why we took the
8 break.

9 **MR. ASSAF:** Correct.

10 **SPECIAL MASTER:** Okay.

11 **MR. ASSAF:** There's another question
12 that came up about whether it was advocacy or just
13 non-advocacy.

14 And again, your Honor, this is going to
15 be in our public brief. But the Third Circuit in
16 Haines v. Liggett says, quote, that there's an
17 absolutely right to have evidence and argument in
18 camera.

19 So I don't want you to think that I'm
20 not going to be an advocate.

21 **SPECIAL MASTER:** In camera. Not ex
22 parte. In camera. There's a difference.

23 **MR. ASSAF:** There is a difference, your
24 Honor. But I think, again, the cases are going to be
25 in our public brief and you'll rule on this. But we

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1 have a chance to make this -- it doesn't have -- I'm
2 going to be an advocate, whether it be in camera or
3 under seal or just privileged.

4 **SPECIAL MASTER:** I expect nothing less
5 from you, Mr. Assaf.

6 **MR. ASSAF:** Okay.

7 **SPECIAL MASTER:** You would disappoint me
8 gravely if you weren't.

9 **MR. ASSAF:** And then --

10 **SPECIAL MASTER:** There's one thing that
11 you do know, and that is whatever you submit, I will
12 read it from cover to cover, including all the cases
13 that you cite.

14 **MR. ASSAF:** That I know.

15 **SPECIAL MASTER:** So you're going to get
16 your fair shot.

17 **MR. ASSAF:** That I know. And I will
18 also picked up more data today. The Irving Younger
19 piece explains a lot.

20 **SPECIAL MASTER:** That's another hundred
21 thousand dollars worth of psychiatric treatment.

22 **MR. ASSAF:** So your Honor, but the
23 one -- the other thing that you mentioned because of
24 now the prima facie determination, I would ask your
25 Honor to consider the following, that to the extent

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1 your Honor after a full briefing determines that
2 there is a prima facie case and then we go to the
3 next step in the crime fraud, I would ask that that
4 ruling be held just to the parties until your final
5 ruling on the crime fraud. And then that would be
6 made as part of the public record.

7 **SPECIAL MASTER:** Okay.

8 **MR. PLACITELLA:** I have to think about
9 that, our position on that.

10 **SPECIAL MASTER:** Why would you object to
11 that?

12 **MR. PLACITELLA:** I want to think about
13 it.

14 **SPECIAL MASTER:** Okay. You're going to
15 think about it and then agree that you're not going
16 to object. All right.

17 **MR. ASSAF:** And then finally, your
18 Honor, I'm sorry about this, but it is --

19 **SPECIAL MASTER:** I'm trying to help you
20 out.

21 **MR. ASSAF:** It is three o'clock, and so
22 I would ask for another 24 hours to submit our public
23 brief, because I would like a chance to now review it
24 again. It's gone through some changes over the
25 weekend given the uncertainty of how we're going to

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1 file.

2 **SPECIAL MASTER:** Is 24 hours enough for
3 you?

4 **MR. ASSAF:** Yes, it is.

5 **SPECIAL MASTER:** Mr. Ryan?

6 **MR. RYAN:** I would ask the same thing,
7 your Honor. And I would just reiterate that to the
8 extent that this process goes any further, it is my
9 view candidly that the in camera process does permit
10 submissions both on behalf of BASF and Cahill which
11 are ex parte, because we have to protect the
12 privilege. And my position will be that Mr.
13 Placitella and his clients are not entitled to those.

14 **SPECIAL MASTER:** Well, and not to tell
15 tales out of school, but you're right, because what's
16 the alternative?

17 **MR. RYAN:** Correct.

18 **SPECIAL MASTER:** You let the cat out of
19 the bag. And clearly it can't be that.

20 So are you going to hold off on the --
21 that was my request of you. You haven't answered my
22 request.

23 **MR. ASSAF:** Hold off on?

24 **SPECIAL MASTER:** Hold off on your -- I
25 love the term secret brief.

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1 **MR. ASSAF:** Yes. And yes, I anticipate
2 that that would be part of any --

3 **SPECIAL MASTER:** Phase 2.

4 **MR. ASSAF:** Phase 2, correct, your
5 Honor.

6 **SPECIAL MASTER:** If we ever got to phase
7 2.

8 **MR. ASSAF:** Correct.

9 **MR. ROTH:** Just so we're clear over
10 here, I understand you're going to be an advocate.
11 But are you saying that this secret brief is not just
12 a compilation of documents, but also an advocacy
13 piece in there as well?

14 **MR. ASSAF:** Well, just to be clear, your
15 Honor, it's an advocacy piece, but it's also factual
16 support from -- by the form of affidavits.

17 **SPECIAL MASTER:** And that's the 220
18 pages in the aggregate. So you've got a brief with
19 certifications that total 220 pages.

20 **MR. ASSAF:** We have 220 pages of
21 briefing supported by -- because every time we make a
22 citation --

23 **SPECIAL MASTER:** Now, you just know that
24 my heart stopped when you said 220 pages of briefing.

25 **MR. ASSAF:** That's why I was glad when

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1 you were saying that you read everything and you're
2 hard-working. I was like: This is perfect for it.

3 **SPECIAL MASTER:** Well, we all have
4 limits. The word brief means more than just a
5 filing. It means it ought to be brief.

6 **MR. ASSAF:** It does, but --

7 **SPECIAL MASTER:** Do you know why they're
8 called briefs?

9 **MR. ASSAF:** No.

10 **SPECIAL MASTER:** Because at common law
11 lawyers were paid by the word. That's why they were
12 called briefs. They were supposed to be brief,
13 which I guess that meaning has been lost. 220 pages
14 is not brief.

15 **MR. COHEN:** I had a professor that I
16 couldn't call them briefs, I had to call them
17 memorandum.

18 **MR. PLACITELLA:** At the right time we'll
19 be heard about the length and the court rule.

20 **SPECIAL MASTER:** Well, we'll address all
21 of this. As I said before, this is one of the two
22 other than that, Mrs. Lincoln, how did you like the
23 play issues in this case. It's going to define in
24 large measure the contours of this case, where it
25 goes and how it's handled.

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1 So as you can see from the liberality
2 with which I quickly granted your request for longer
3 briefs, I'm not going to limit anybody.

4 I will tell you that as a consumer of
5 briefs, once a brief exceeds a certain page
6 limitation, you start to lose your reader.

7 But that's your call to make. And I
8 will honor whatever way you want to do it. That's
9 perfectly fine with me. But please do take some
10 pity on this poor soul.

11 **MR. ASSAF:** Thank you, your Honor.

12 **SPECIAL MASTER:** At some point they may
13 have to respond to that, you know. And then it just
14 gets on and on and on.

15 So I'm not saying no. But please give
16 it some thought.

17 **MR. ASSAF:** Okay.

18 **SPECIAL MASTER:** And I'm sure you
19 understand that in addition to whatever -- this is a
20 big issue. Let me start from there. It's a big
21 issue.

22 So you can rest assured that in addition
23 to whatever you submit to me, I'm going to do my own
24 research, because I have to get this right. And
25 I've already pulled the ABA single volume on

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1 attorney/client privilege. It's a three volume set.
2 But the first volume deals with just the
3 attorney/client privilege. I already pulled that to
4 the side. And I intend to read that from cover to
5 cover before I start determining the application.

6 So that's just one of the things, the
7 source materials that I intend to look at.

8 Again, it's a big issue. And it's
9 going to be given the dignity it deserves.

10 **MR. ASSAF:** Thank you, your Honor.
11 That's all we can ask.

12 **MR. RYAN:** I just want to make sure I
13 understand, your Honor.

14 So BASF is going to file its public
15 brief, non-privileged information. We're permitted
16 to do the same?

17 **SPECIAL MASTER:** Tomorrow.

18 **MR. RYAN:** Tomorrow. And then Chris
19 will submit his --

20 **SPECIAL MASTER:** His reply.

21 **MR. RYAN:** Just from a pure housekeeping
22 standpoint, there's no sealing order as far I'm aware
23 in place right now.

24 **SPECIAL MASTER:** No.

25 **MR. RYAN:** I presume BASF is going to

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1 file on ECF. I don't know.

2 **MR. ASSAF:** Yeah.

3 **MR. RYAN:** But we should probably have a
4 conversation about the logistics of this, because
5 right now there's no sealing order.

6 And my view of the world would have been
7 candidly to file some kind of bookmarks that just
8 indicate that the submissions have been made to your
9 Honor as part of the process rather than filing them
10 on the ECF now.

11 **SPECIAL MASTER:** If you prefer to do
12 that, that's fine. As you well know, you can just
13 file a bookmark that takes a docket entry and sort of
14 reserves it for you. And then you file whatever
15 you're filing directly.

16 Normally that's the process you follow
17 when something's being filed under seal, because
18 normally what the clerk's office does is the clerk's
19 office makes that entry for you.

20 **MR. RYAN:** Right.

21 **SPECIAL MASTER:** But since electronic
22 filing, we've kind of made the clerk's office a
23 little irrelevant in that respect. And it then
24 becomes the obligation of the lawyers to do it.

25 If you think that there is material in

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1 your opposition briefs that you don't want the world
2 at large to see, I'm okay with you docketing a
3 bookmark and just sending the brief to me. I'm okay
4 with that.

5 At some point it's going to have to
6 become part of the public record at some point,
7 because if whoever is aggrieved by whatever decision
8 I make is going to seek review, and the only way for
9 it to be reviewed is for it to become part of the
10 public record. So, you know, that's -- but that's
11 for a different day.

12 If your preference is to file a bookmark
13 and file the brief itself privately, I don't have any
14 problem with that. That's perfectly fine with me.

15 If you read your opposition brief and
16 it's not one that deserves to be, you know, put on
17 double secret probation, then that's fine. That's
18 your call to make. I'm okay either way.

19 However you think is best for you works
20 fine with me, as long as I've got a docket entry,
21 which I don't have for this letter, and the
22 responses. But that's okay. We'll finesse that.

23 But as long as I have a docket entry
24 that I can make reference to later on so that people
25 who review it know that this stuff didn't just fly in

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1 over the transom, and I have the ability to complete
2 the record if necessary for review, I'm fine with
3 whatever works for you guys. You don't need to air
4 your laundry in public. It's not necessary as far as
5 I'm concerned.

6 **MR. RYAN:** Thank you.

7 **SPECIAL MASTER:** Have we heard anything
8 at all from the Supreme Court on the pending motion?

9 **MR. PLACITELLA:** It's pending. They
10 only got all the briefing I think in mid to late
11 December.

12 **SPECIAL MASTER:** Oh, then it's going to
13 be a while.

14 **MR. PLACITELLA:** I don't know what their
15 first conference date is.

16 **SPECIAL MASTER:** Doesn't matter, because
17 that's not what determines it. What determines it is
18 motions -- I think I know a little bit about this.

19 Motions before the Supreme Court are
20 actually reviewed by the Supreme Court Clerk's
21 Office. They don't go to the Justices for a law
22 clerk to create a memo. There are staff lawyers in
23 the clerk's office who review all of the motions.
24 And they actually prepare what is in essence the
25 bench memo in respect of that motion.

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1 And when that process is completed, then
2 the clerk of the court calendars it before the Court
3 during a conference.

4 And it's all a function of how much work
5 the staff lawyers have. More importantly, how much
6 work that particular staff lawyer has as to when it's
7 going to be percolated up.

8 I've seen them take several months to
9 come up, because obviously the moment that an
10 emergent application comes in, everything else has to
11 get put to the side. And you would be surprised how
12 many of those there are.

13 **MR. ASSAF:** Well, the emergent
14 application was granted, right, the stay?

15 **MR. PLACITELLA:** Well, it was consented
16 to, wasn't it?

17 **MR. ASSAF:** Yeah, but a Justice signed
18 it.

19 **SPECIAL MASTER:** Well, normally an
20 emergent application is through a single Justice,
21 even if it's --

22 **MR. PLACITELLA:** Well, it was consented
23 to.

24 **SPECIAL MASTER:** Even if it's consented
25 to, it still has to be entered by a single Justice.

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1 It's actually the only thing you do by
2 yourself when you're on the Supreme Court is emergent
3 applications. Everything else is done as a body.

4 And I would always give people the
5 opportunity to argue. Come to my chambers and we'll
6 talk. And I'd enter an order right after, so --
7 which was generally drafted ahead of time. I can
8 say that now. I couldn't say that then.

9 **MR. PLACITELLA:** We figured that's what
10 was going to happen, so...

11 **SPECIAL MASTER:** Well, you know, I was
12 then of the view and still remain of the view that if
13 really good lawyers say they need this quickly, then
14 they need it quickly. And you need to respond to it
15 quickly. Not an issue view shared by everyone. So
16 in any event...

17 **MR. ASSAF:** I once had -- Bill McGuire,
18 who I was working with, and he --

19 **SPECIAL MASTER:** Great guy.

20 **MR. ASSAF:** -- said the same thing to
21 me. We needed an emergent application from the
22 Appellate Division. And he said: I'm going to write
23 a letter and the Judge is going to call me. I said:
24 Really? He said: Yeah. And it's exactly what
25 happened.

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1 **SPECIAL MASTER:** Huge loss to the
2 profession. What a great, great guy. Excellent
3 lawyer and just a wonderful human being. Big loss.
4 Anything else, counsel?

5 Well, thank you very much. I've kept
6 you way too long today. And that's partly my fault
7 for being too polite to you.

8 **MR. ASSAF:** We got a lot done.

9 **SPECIAL MASTER:** Especially to Mr.
10 Placitella, but that's okay.

11 (The matter concluded at 3:20 p.m.)

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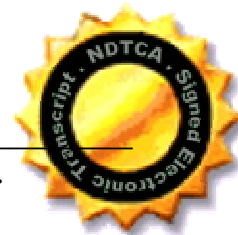
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CERTIFICATE OF OFFICER

I, ROBERT J. BOCCOLINI, a Certified Court Reporter, do hereby certify that the foregoing is a true and accurate transcript of the stenographic notes taken by me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel and that I am not financially interested in this action.


ROBERT J. BOCCOLINI, C.C.R.
Certificate No. XI01040
Date: January 16, 2018



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